No. 80-2070

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the right provided by Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, to fill management level positions with Japanese nationals, is limited by Title VII of the Civil Rights Act of 1964, as amended.

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International Trade Administration, Office of International Investment, *Fact Sheet on Foreign Direct Investment in the United States* (U.S. Dep't of Commerce pub.) (May 1981) 9

Sumitomo Shoji America, Inc. ("Sumitomo") petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated January 9, 1981 (App. A, *infra*, 1a-15a) is reported at 638 F.2d 552. The opinion of the United States District Court for the Southern District of New York dated June 5, 1979 (App. C, *infra*, 19a-37a) is reported at 473 F. Supp. 506. Certification for immediate appeal pursuant to 28 U.S.C. § 1292(b) was granted in an opinion of the United States District Court for the Southern District of New York dated August 9, 1979 (App. D, *infra*, 39a-44a), unofficially reported at 20 Empl. Prac. Dec. (CCH) ¶ 30,205 and 20 Fair Empl. Prac. (BNA) 72. The opinion of the United States District Court for the Southern District of New York on reargument, dated November 29, 1979 (App. E, *infra*, 45a-61a), is unofficially reported at 21 Empl. Prac. Dec. (CCH) ¶ 30,501 and 21 Fair Empl. Prac. (BNA) 580.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 9, 1981 (App. B, *infra*, at 17a-18a). On March 31, 1981, Justice Marshall signed an order extending the time for filing a petition for a writ of certiorari to and including June 6, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY, STATUTES AND REGULATION INVOLVED

1. Article VIII(1) of the Treaty of Friendship, Commerce and Navigation Between the United States and Japan, 4 U.S.T. 2063 (1953) (the "Treaty"), provides in relevant part (4 U.S.T. at 2070):

"Nationals and companies of either Party shall be permitted to engage within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."

2. Article I(1) of the Treaty provides in relevant part (4 U.S.T. at 2066):

"Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities . . . ."

3. Article VII(1) of the Treaty provides (4 U.S.T. at 2069):

"Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired."

4. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e-(2)(a), provides:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

5. Section 703(e) of Title VII, 42 U.S.C. § 2000e-(2)(e), provides in relevant part:

"(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

6. Section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952, as amended (the "INA"), 8 U.S.C. § 1101(a)(15)(E), provides in relevant part:

"[A]n alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . ."

7. 22 C.F.R. § 41.40(a) (1980) provides in relevant part:

"(a) An alien shall be classifiable as a nonimmigrant treaty trader if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(E)(i) of the Act and that: (1) He intends to depart from the United States upon termination of his

status; and (2) if he is employed by a foreign person or organization having the nationality of the treaty country which is engaged in substantial trade as contemplated by section 101(a)(15)(E)(i), he will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity."

STATEMENT OF THE CASE

Petitioner Sumitomo, defendant in the District Court below, is a corporation organized under the laws of the State of New York and is a wholly-owned subsidiary of a Japanese commercial enterprise (App. A, *infra*, at 2a).

Respondents, plaintiffs in the District Court below, claim with one exception to be citizens of the United States and past or present female secretarial employees of Sumitomo (App. C, *infra*, at 20a).[1] They claim that "[Sumitomo's] practice of hiring only male Japanese nationals for management-level positions discriminates against them on the basis of sex and national origin in violation of Title VII . . ." (App. A, *infra*, at 3a). The jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343 (App. C, *infra*, at 21a).

Sumitomo moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing respondents' complaint on several grounds including that Sumitomo's employment of Japanese nationals in management level positions is protected by the Treaty and does not constitute discrimination of a kind made illegal by Title VII (*id.*).

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1 Plaintiffs purport to bring their action individually and as representatives of a class (App. A, *infra*, at 3a). No motion has been made for determination whether the action may be maintained as a class action.

In its opinion dated June 5, 1979, the District Court denied Sumitomo's motion to dismiss the respondents' Title VII claim (App. C, *infra*, at 22a), holding that because Sumitomo is a New York corporation it had "neither standing nor need to invoke the aegis of the Treaty" (App. C, *infra*, at 30a).[2] In an opinion dated August 9, 1979, the District Court certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) the "question concerning the relationship of Title VII to the Treaty" (App. D, *infra*, at 44a).[3]

On appeal, the Second Circuit held that Sumitomo is entitled to invoke the employment provisions of Article VIII(1) of the Treaty (App. A, *infra*, at 4a). It nevertheless affirmed the denial of Sumitomo's motion on the ground that the Treaty employment right is limited by Title VII. The Second Circuit, referring to the bona fide occupational qualification ("bfoq") exception of Title VII, 42 U.S.C. § 2000e-2(e), stated that "[t]o require the Japanese company to go forward with some evidence of bfoq status does not in our view impose undue burdens on foreign employers" (App. A, *infra*, at 15a) and remanded the case to the District Court for further consistent proceedings (*id.*).

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2 Respondents had also claimed in their complaint that Sumitomo's employment practices violate the Civil Rights Act of 1866, 42 U.S.C. § 1981, and the Thirteenth Amendment to the United States Constitution. The District Court in its June 5, 1979, opinion dismissed plaintiffs' claim based on 42 U.S.C. § 1981 and found that the Thirteenth Amendment claim had been abandoned (App. A, *infra*, at 3a & n.1).

3 On August 15, 1979, the United States Department of State released documents relating to negotiation of the Treaty, and Sumitomo requested that the District Court reconsider its June 5, 1979 opinion. The District Court granted reargument but by opinion dated November 29, 1979 (App. E, *infra*, 45a-61a) again denied the motion to dismiss.

REASONS FOR GRANTING THE PETITION

The decision of the Second Circuit in this case is in direct conflict with a decision on the same matter by the United States Court of Appeals for the Fifth Circuit in *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353 (5th Cir. 1981) (App. F, *infra*, 63a-97a). The *Spiess* Court had before it, and expressly rejected, the decision of the Second Circuit in *Avigliano*. Thus this case is within the considerations of Rule 17.1(a) of the Rules of this Court. This conflict between circuits presents a particularly compelling case for the exercise of this Court's power of certiorari because of the necessity for the United States to speak as " 'one people, one nation, one power' " in its relations with foreign nations. *Zschernig v. Miller*, 389 U.S. 429, 442 (1968) (Stewart, J., concurring), *quoting Chinese Exclusion Case*, 130 U.S. 581, 606 (1889).

In *Spiess*, American employees of C. Itoh & Company (America), Inc. ("C. Itoh-America"), a New York corporation wholly owned by a Japanese parent corporation, brought an action under Title VII alleging that C. Itoh-America discriminates against its American employees by making managerial positions available only to Japanese nationals (App. F, *infra*, at 64a). C. Itoh-America moved to dismiss on the same Treaty-based grounds as Sumitomo, arguing that the Treaty "permits it to hire only Japanese citizens" for those positions (*id.*). C. Itoh-America's motion was denied by the United States District Court for the Southern District of Texas, which held that C. Itoh-America could not assert the Article VIII(1) right to employ executive personnel of its choice (App. F, *infra*, at 65a).[4]

The Fifth Circuit reversed, stating: "[W]e hold that article VIII(1) does exempt C. Itoh-America from domestic employment discrimination laws to the extent of permitting discrimination in favor of Japanese citizens in employment for executive and technical positions." (App. F, *infra*, at 72a.)

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4 The District Court's opinion in *Spiess*, including its amending opinion allowing interlocutory appeal pursuant to 28 U.S.C. § 1292(b), is reported at 469 F. Supp. 1 (S.D. Tex. 1979).

In contrast, the Second Circuit in this case held that the Treaty "does not exempt Japanese companies operating in the United States . . . from American laws prohibiting discrimination in employment." (App. A, *infra*, at 4a.) In consequence of these conflicting decisions the Fifth Circuit remanded *Spiess* with directions to dismiss while the Second Circuit remanded the instant case for trial.

The opposing decisions reached by the Second and Fifth Circuits result from direct conflicts in their interpretations of the scope of the rights established by Article VIII(1) of the Treaty and in their views of the relationship between United States international treaty obligations and domestic legislation.

The Second Circuit construed the Article VIII(1) employment right narrowly, stating that it was "primarily intended to exempt companies operating abroad from local legislation restricting the employment of noncitizens." (App. A, *infra*, at 13a-14a.) Although acknowledging that the clause "was also intended, in furtherance of the overall purpose of the Treaty, to facilitate a party's employment of its own nationals to the extent necessary to insure its operational success in the host country" (App. A, *infra*, at 14a), it declined to give effect to this purpose except to the extent deemed consistent with the bfoq exception to Title VII.[5]

The Fifth Circuit gave a broader reading to Article VIII(1). Noting that the general purpose of the Treaty, from the American perspective, was "primarily to facilitate American private-sector investment in foreign nations" (App. F, *infra*, at 77a), it declared:

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5 The Second Circuit's opinion thus assumes that the Treaty authorized practice of hiring on the basis of Japanese nationality could, unless the bfoq defense is established, constitute "national origin" discrimination under Title VII (App. A, *infra*, at 14a). This assumption is in conflict with the conclusion of this Court in Espinoza v. Farah Manufacturing Co., Inc., 414 U.S. 86, 95 (1973), that "nothing in Title VII makes it illegal to discriminate on the basis of citizenship or alienage." *See also* Morton v. Mancari, 417 U.S. 535 (1974).

> "The article VIII(1) right to free choice of technical and managerial personnel sought to ensure that the American businessman's investment in the host country would remain within his control. The legislative history cited to us by C. Itoh-America demonstrates that the Senate, in consenting to ratification of the Treaty, was concerned about the right of American companies to use American personnel to control their investments in Japan . . . . It is self-evident that this same goal of American negotiators in formulating article VIII(1) was the goal of Japanese negotiators who sought it to protect Japanese companies operating in the United States." (*Id.*)

The Fifth Circuit expressly rejected the Second Circuit's attempt to make the Article VIII(1) right of choice in employment subject to Title VII, saying that to do so "would render its inclusion in the Treaty virtually meaningless." (App. F, *infra*, at 78a.) Instead, giving effect to the purpose of the Treaty, the Fifth Circuit concluded that Article VIII(1) permits a United States subsidiary of a Japanese enterprise "to hire only Japanese personnel for executive and technical positions." (App. F, *infra*, at 80a.)

The Second and Fifth Circuits also differed on the legal effect of United States international treaty obligations in relation to domestic legislation. The Second Circuit attempted to make Article VIII(1) of the Treaty and Title VII congruent by narrowly construing the Treaty obligation and broadly construing the bfoq exception to Title VII. It characterized this approach as giving "due weight" to the rights provided by the Treaty (App. A, *infra*, at 15a). The Fifth Circuit criticized this reasoning saying that it "misapprehends the nature of a right created in the course of international bargaining." (App. F, *infra*, at 77a.) Citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), the Fifth Circuit stated:

> "No evidence suggests that Congress intended to repudiate article VIII(1) when it enacted Title VII. Domestic

employment discrimination laws occupy a high priority on the nation's agenda, and courts often resolve statutory conflicts in their favor. In this case, however, resolving doubts in favor of Title VII would go beyond the judicial sphere of interpretation. In the absence of congressional guidance, we decline to abrogate the American government's solemn undertaking with respect to a foreign nation." (App. F., *infra*, at 79a.)

Resolution of the conflict between the Second and Fifth Circuits is essential to clarify the rights of foreign investors to manage and control, with key personnel of their choice, the enterprises they establish or acquire in the United States and the reciprocal rights of American investors to manage and control their enterprises abroad.[6] Left unresolved, the difference between the two Circuits with respect to management and control of such enterprises creates significant uncertainties that could well impair the flow of foreign direct investment between the United States and other countries.[7]

Finally, an important question of federal law arises from the Second Circuit's confusion of the purposes of Title VII with those of the INA. The INA restricts to certain specifically authorized cases the entry of aliens for purposes of assuming employment in the United States. One such case is that of nonimmigrant "treaty traders" whose entry is authorized by

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6 These rights are dealt with in Article VII(1) and Article VIII(1) of the Treaty with Japan. The "unitary structure" of those Treaty articles was recognized by the Second Circuit (App. A, *infra*, at 8a). Similar provisions are found in a number of other friendship, commerce and navigation treaties to which the United States is a party. Pending litigation brings into question employment provisions of one of those other treaties. *See* Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181 (E.D.N.Y. 1979).

7 American direct investment abroad totalled over $192 billion in 1979. U.S. Dep't of Commerce, *Survey of Current Business*, table 13, at 27 (Aug. 1980). Foreign direct investment in the United States in the same year reached more than $52 billion. International Trade Administration, Office of International Investment, *Fact Sheet on Foreign Investment in the United States* (U.S. Dep't of Commerce pub.) (May 1981).

the Department of State and the Immigration and Naturalization Service pursuant to bilateral treaties of friendship, commerce and navigation. *See* Article I(1) of the Treaty; Section 101(a)(15)(E)(i) of the INA, 8 U.S.C. § 1101(a)(15)(E)(i); and 22 C.F.R. § 41.40(a). The Second Circuit's decision, if allowed to stand, will result in unnecessary re-examination of these Department of State and Immigration and Naturalization Service authorizations by our Federal courts under the Title VII bfoq exception.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 6, 1981

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 314—September Term, 1980

(Argued: October 17, 1980 Decided: January 9, 1981)

Docket No. 80-7418

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Plaintiffs-Appellees,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and MESKILL,

Circuit Judges.

Interlocutory appeal pursuant to 28 U.S.C. § 1292(b) from an order of the District Court for the Southern District of New York, entered by Judge Charles H. Tenney denying defendant's motion to dismiss plaintiffs' claims of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, on the ground that the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan exempts defendant from any legal challenge to its practice of filling its executive-level positions with Japanese nationals.

Affirmed and remanded.

J. PORTIS HICKS, Esq., New York, NY (Wender, Murase & White, New York, NY, of counsel), *for Appellant.*

LEWIS M. STEEL, Esq., New York NY (Eisner Levy Steel & Bellman, P.C., New York, NY, of counsel), *for Appellees.*

MARCIA B. RUSKIN, Attorney, Equal Employment Opportunity Commission, Washington, DC (Leroy D. Clark, General Counsel, Joseph T. Eedins, Associate General Counsel, Lutz Alexander Prager, Attorney, Equal Employment Opportunity Commission, Washington, DC, of counsel), *for Amicus Curiae Equal Employment Opportunity Commission.*

MANSFIELD, *Circuit Judge*:

Sumitomo Shoji America, Inc. ("Sumitomo"), a New York-incorporated, wholly-owned subsidiary of a Japanese commercial firm, appeals pursuant to 28 U.S.C. § 1292(b) from an

order of the District Court for the Southern District of New York entered by Judge Charles H. Tenney, denying its motion to dismiss this class action against it by female secretarial employees claiming that its practice of hiring only male Japanese nationals for management-level positions discriminates against them on the basis of sex and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"), the Civil Rights Act of 1966, 42 U.S.C. § 1981, and the Thirteenth Amendment. Dismissal was sought by Sumitomo pursuant to F.R.Civ.P. 12(b)(6) on the ground that the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 (the "Treaty" or "Japanese Treaty"), exempts Japanese trading companies and their wholly-owned subsidiaries incorporated in the United States from the application of Title VII. Judge Tenney denied Sumitomo's motion insofar as it sought dismissal of plaintiffs' Title VII claims,[1] on the ground that the Treaty was not meant to protect the employment practices of Japanese subsidiaries incorporated in the United States. 473 F. Supp. 506. Sumitomo sought an immediate appeal of this question under 28 U.S.C. § 1292(b), and that request was granted.[2]

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1 The district court did, however, dismiss plaintiffs' § 1981 claim on other grounds, and also found that plaintiffs' Thirteenth Amendment claim had been abandoned.

2 *Avigliano, et al. v. Sumitomo Shoji America, Inc.*, No. 77 Civ. 5641 (CHT) (August 9, 1979) (unreported). Judge Tenney refused to certify two questions of law which plaintiffs had sought to appeal: whether an allegation of sex and nationality discrimination makes out a valid cause of action under § 1981, and whether defendant's counterclaims sounding in common law tort should have been dismissed. Neither issue is before us this time

Before the appeal could be heard counsel for Sumitomo sought reconsideration of Judge Teeney's refusal to dismiss, based on the U.S. Department of State's recent release of a number of documents which apparently were relevant to a proper interpretation of the Japanese Treaty. Judge Tenney granted Sumitomo's request for reconsideration, and this Court in effect remanded to Judge Tenney by denying Sumitomo's permission to appeal, but without prejudice to a later renewal of that request. After reconsideration based on the State

We affirm, but on grounds other than that relied on by the district court. We hold that Sumitomo was entitled to invoke the employment provisions of the Treaty, but that the Treaty does not exempt Japanese companies operating in the United States, whether or not they are incorporated in the United States, from American laws prohibiting discrimination in employment.

The Japanese Treaty is a commercial agreement designed to encourage trade and investment between the United States and Japan. It is one of several dozen similar treaties entered into by the United States in the post-World War II period, and carries on a tradition antedating the Constitution. See generally, Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 230-31 (1956) (hereinafter cited as *Treaties*). The general aim of these treaties is to

> "establish or confirm in the potential host country a governmental policy of equity and hospitality to the foreign investor. This means, above all, assurance that the enterprise and property of the alien will be respected and that he will be accorded equal protection of the laws alike with citizens of the country." *Id.* at 230.

In the Japanese Treaty, as in almost all other Friendship, Commerce and Navigation ("FCN") agreements, the goal of equal protection of the laws is put into effect by means of specific provisions "based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded." 4 U.S.T. at 2066.

The heart of the Japanese Treaty is Article VII, which the State Department has called "the basic 'establishment' provi-

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Department documents, Judge Tenney once again denied Sumitomo's motion to dismiss, this time on the ground that, while Japanese subsidiaries incorporated in the United States are given some rights by the Treaty, the specific provision of the Treaty on which Sumitomo was relying was not intended to apply to subsidiaries. *Avigliano, et al. v. Sumitomo Shoji America, Inc.*, No. 77 Civ. 5641 (CHT) (November 29, 1979) (unreported).

sion." Outgoing Airgram No. A-453, Department of State to USPOLAD, Tokyo, dated January 7, 1952. Article VII provides in relevant part that:

> "Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, *whether directly or by agents or through the medium of any form of lawful juridical entity.* Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) *to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party;* and (c) *to control and manage enterprises which they have established or acquired.* Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party." 4 U.S.T. at 2069. (Emphasis supplied.)

In order to facilitate the staffing of overseas operations, the Treaty provides in Article I that:

> "Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein:
>
> (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities. . . ." *Id.* at 2066,

and in Article VIII that

> "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive person-

> nel, attorneys, agents and other specialists *of their choice." Id.* at 2070. (Emphasis supplied).

Implementing these provisions, the State Department has issued regulations applicable to the FCN treaties which greatly facilitate the entry into the United States of Japanese nationals who will work as "treaty traders" for Japanese trading units set up pursuant to Article VII of the Treaty. 22 C.F.R. § 41.40.

In addressing defendant's motion to dismiss based on the Treaty, the district court did not rule on whether the freedom-of-choice language of Article VII ("companies of either Party shall be permitted to engage, within the territories of the other Party, . . . executive personnel . . . of their choice") was sufficiently broad to exempt Japanese subsidiaries operating in the United States from the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964. 473 F. Supp. at 509-13. Its ruling was instead limited to the question of Sumitomo's standing. In its first opinion, the court held that a U.S.-incorporated subsidiary such as Sumitomo could not "invoke the aegis of the Treaty as sanction for its employment practices," 473 F. Supp. at 509, because the definitional section of the Treaty, Article XXII(3), provides that:

> "Companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party." Article XXII(3), 4 U.S.T. at 2080; *quoted at* 473 F. Supp. at 509. (Emphasis supplied).

In the court's opinion, the emphasized language of Article XXII(3) had the effect of classifying Sumitomo as an American, not a Japanese corporation, and thus barred it from invoking Article VIII. In its second opinion (dated November 29, 1979) the court conceded that

> "Article XXII(3) was not intended to bar locally incorporated subsidiaries of foreign companies from claiming any substantive rights under the Treaty."

Nevertheless, despite its finding that Article XXII(3) did no more than determine "an entity's status" and was not meant to limit or define the substantive rights which an entity was to enjoy under the Treaty, the district court refused to alter its original view that Sumitomo lacked standing to invoke Article VIII:

> "Articles VI(4) and VII(1) & (4), by their terms, give 'enterprises in which nationals and companies . . . have a substantial interest' and enterprises controlled by nationals and companies, respectively, substantive rights. The drafters knew how to give locally incorporated subsidiaries rights under specific articles. In Article VIII(1) they did not do so. The freedom-of-choice rights are given to 'nationals and companies of either Party . . . within the territories of the other Party.' Because the provision does not by its own terms extend to locally incorporated subsidiaries, the Court must look to Article XXII(3) to determine whether 'nationals and companies' can be read to include subsidiaries. That Article provides that '[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed parties thereof.' By this language Sumitomo is a United States company. It is not a Japanese company and is thereby ineligible for freedom-of-choice protection within the territories of the United States."

DISCUSSION

Sumitomo's Standing

We are satisfied that the Treaty's provisions may be invoked by a wholly-owned Japanese subsidiary incorporated in the United States to the same extent that they may be availed of by Japanese corporations or firms operating in the United States. To hold that the Japanese business enterprise forfeits its rights under the Treaty merely because it chooses to function through a wholly-owned locally-incorporated subsidiary would in our view disregard substance for form, something which we have

previously rejected in treaty construction. *Reed v. Wiser*, 555 F.2d 1079, 1085-86 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). Moreover, such a reading would overlook the purpose of the Treaty, which was not to protect foreign investments made through branches, but rather to protect foreign investments generally. See generally, *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966); *Maximov v. United States*, 299 F.2d 565, 568 (2d Cir. 1962), *affd.*, 373 U.S. 49 (1963). In addition, if the district court's reading were adopted, a Japanese enterprise could easily circumvent such a construction by simply transforming its wholly-owned U.S. subsidiaries into branches. To adopt such a reading would also in our opinion do violence to the admittedly unitary structure of Articles VII and VIII, see, e.g., Foreign Service Despatch No. 2529, from High Commissioner for Germany to the Department of State, dated March 18, 1954, p. 1. It is unlikely that the parties to the Treaty would have agreed to grant each other broad rights to establish and manage subsidiaries abroad in Article VII, and then gone on to bar those same subsidiaries from invoking almost all of the substantive provisions which the Treaty contains.

Finally, if we were to accept the view that the three provisions in the Treaty which explicitly grant rights to subsidiaries (Article VI(4), Article VII(1) and Article VII(4) exhaust the rights to be accorded to them, a crazy-quilt pattern would emerge. Under such a reading *Japanese branches* in the United States would be guaranteed "access to the courts of justice" (Article IV(1)), protected against "unlawful entry or molestation" (Article VI(2)), given the right to dispose of "property of all kinds" (Article IX(4)), allowed to obtain and maintain "patents of invention" (Article X), permitted to make "payments, remittances and transfers of funds or financial instruments" (Article XII(1)), and allowed to engage in "importation and exportation" (Article XIV(5)). *Japanese subsidiaries*, on the other hand, would not be guaranteed any of the rights conferred on Japanese branches operating in the United States, but would instead have to be content with national treatment in such areas as "the taking of privately owned enterprises into

public ownership and . . . the placing of such enterprises under public control" (Article VI(4)). It is illogical to infer that the drafters of the Treaty intended to make such a dramatic distinction between forms of business operation or to act in such a haphazard way.

In our view the three provisions in the Treaty which specifically mention subsidiaries were not intended to define the outer limits of the rights to be accorded to them, but were instead designed to add to the rights which parties were to enjoy in their capacity as "companies of either Party." This construction furthers the Treaty's purpose, which is to support foreign investment generally, regardless of the specific corporate vehicle employed. Given the complete absence of any evidence in the Treaty's legislative history suggesting that only Japanese branches were to be given the various specific guarantees listed above but that Japanese subsidiaries were not, we are persuaded that the form of business operation was not considered relevant to the question of which entities could invoke the substantive provisions of the Treaty, except in three instances where *extra* protection was to be accorded to subsidiaries.

This interpretation also finds support in negotiations preceding the ratification of another FCN treaty, that between the United States and the Netherlands. There, Dutch negotiators expressed concern that the proposed treaty language (which was identical in all relevant respects to the language contained in the Japanese Treaty) might be read as not conferring equal benefits on branches and subsidiaries (or "controlled companies," in the usage of the negotiators). The Dutch were particularly concerned that the provision in Article XXIII(3) of the Dutch treaty (which tracked the language of Article XXII(3) of the Japanese Treaty) would exclude locally-incorporated subsidiaries from all substantive benefits accorded to "companies of either Party." State Department negotiators made it clear that this was not the case, and were even prepared to insert a clarifying phrase in Article XXIII(3), if necessary:

> "[D]espite a superficial appearance to the contrary, the legal adviser's formulation of the proviso to be inserted in

> Article XXIII paragraph 3 was *not* calculated to detract in any way from the rights and privileges a 'controlled company' would otherwise enjoy. . . . [T]he treaty is always a floor and not a ceiling. The effect of the legal advisor's formulation was to assure that the 'controlled company' will always, as a minimum, get everything that the parent company gets as a matter of treaty *right*—but was not calculated to detract from any additional privileges that the 'controlled company' may actually have. . . . The Department has the same interests as [the Dutch negotiators] in avoiding damage to the position of 'controlled companies', because Americans have 'controlled companies' abroad just as the Dutch have them in the U.S." Official-Informal Letter from Herman Walker, Jr.,[3] Trade Agreements and Treaty Division, Department of State, to Counselor for Economic Affairs, American Embassy, the Hague, Netherlands, dated October 28, 1955. (Emphasis in original).

After extensive discussions on the issue, the Dutch negotiators concluded that there was in fact no need to include in the Treaty a provision explicitly conferring parent company rights on subsidiaries:

> "[N]obody would deny to a company controlled by nationals or companies of one of the contracting Parties the treatment, which is accorded to the parent company, except perhaps in a very special case e.g. taxation. . . . As the principle is generally accepted I think it would be superfluous to spell it out." Letter from Netherlands Negotiator to Economic Counselor, U.S. Embassy, The Hague, Netherlands, dated November 8, 1955.

This incident corroborates our view, based on the language and purpose of the Japanese Treaty, that those provisions

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3 The author's identity, while not appearing on the letter itself, can be determined by noting the addressee of the letter written in reply, Official-Informal Letter from Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, dated November 4, 1955.

which specifically grant rights to subsidiaries were not intended to bar subsidiaries from enjoying the additional rights granted to branches.

In short, as the district court recognized (but did not apply), Article XXII(3) defines a company's nationality for the purpose of recognizing its status as a legal entity but not for the purpose of restricting substantive rights granted elsewhere in the Treaty. This view of Article XXII(3) has been adopted consistently throughout the life of the Treaty, see, e.g., Department of State Despatch No. 13 from Office of the United States Political Adviser for Japan, dated April 8, 1952; Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 383 (1956); Department of State Airgram No. A-105, to American Embassy, Tokyo, dated January 9, 1976, and in our opinion is supportive of the general policies underlying the Treaty. The district court's acceptance of this general proposition is inconsistent with its eventual conclusion that Article XXII(3) bars Sumitomo from invoking Article VIII.[4] Since Sumitomo is a wholly-owned

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4 Article XXII(3) leaves open the determination of whether a subsidiary incorporated in the United States is sufficiently "Japanese" to invoke the Treaty's various substantive provisions. Resolution of this issue would depend on a case-by-case analysis of the relevant facts. In resolving the issue the regulations adopted by the Department of State in connection with admission of treaty traders are relevant. For a treaty trader to be admitted,

> "The employment must be . . . by an organization which is principally owned by a person or persons having the nationality of the treaty country." 22 C.F.R. § 41.40(a).

The State Department has supplemented this basic regulation with visa rules further prescribing the standards to be met by treaty traders entering the United States. These rules define the nationality of a corporation eligible to employ treaty traders as follows:

> "The nationality of a firm is determined for the purpose of section 101(a)(15)(E)[8 U.S.C. § 1101(a) of the Immigration and Nationality Act of 1952] by the nationality of those persons who own the principal amount (i.e., more than 50 percent) of the stock of that corporation, regardless of the place of incorporation." 9 *Foreign Affairs Manual*, Part II, § 41.40, Note 8. See generally, *Matter of N.S.*, VII I. & N. Decs. 426, 428 (1957).

subsidiary of a Japanese corporation, it is properly classified as a Japanese company for the purpose of invoking the substantive provisions of the Treaty, including Article VIII.[5]

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5 We are aware that the State Department has recently reached a conclusion on this issue which is at variance with ours. See Letter from James R. Atwood, Deputy Legal Adviser, U.S. Department of State to Lutz Alexander Prager, Esq., Assistant General Counsel, Equal Employment Opportunity Commission, dated September 11, 1979, *reprinted in* 74 Am. J. Int'l L. at 158-59 (1980) ("it was not the intent of the negotiators to cover locally-incorporated subsidiaries").

Even after giving weight to the State Department's views, *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961), we do not find its position persuasive. The September 11, 1979, letter announcing the Department's position directly contradicted a similar letter written on behalf of the Department less than a year earlier. Letter of Lee R. Marks, Deputy Legal Adviser, U.S. Department of State to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, dated October 17, 1978, *reprinted in* 73 Am. J. Int'l L. at 281-84 (1979) ("In determining the scope of Article VIII [of the Japanese Treaty], we see no grounds for distinguishing between subsidiaries incorporated in the United States . . . and those operating as unincorporated branches"). Moreover, both letters were conclusory in tone, providing little guidance as to how the author reached the position adopted. Finally, neither of the letters referred to any documentary evidence supporting its position, nor did the 1979 letter explain how the 1978 letter writer had fallen into error.

On September 26, 1980, long after this appeal had been taken, counsel for the Equal Employment Opportunity Commission ("EEOC"), which is participating in this case as *amicus curiae*, sent us a copy of a State Department document purporting to be a letter dated September 9, 1980, from the Department of State to the Government of Denmark to the effect that it was not the intent of negotiators of such a FCN treaty to permit locally-incorporated subsidiaries to invoke its provisions. However, the letter bears evidence that the EEOC, several months prior to the transmittal of the State Department's letter, had participated in its preparation (it bears the notations "Clearances: EEOC/GC L. Prager," who is counsel for the EEOC as amicus on this appeal), from which it might be inferred that the letter was designed to support the EEOC's position here.

Under the circumstances it was improper for the EEOC to have submitted the September 9th letter to us. However, since we give it no weight whatsoever we deny Sumitomo's motion for permission to investigate its provenance.

Relationship Between Article VIII of the Treaty and Title VII of the Civil Rights Act of 1964

Turning to the question of whether the freedom-of-choice language of Article VIII of the Treaty exempts Sumitomo from Title VII of the Civil Rights Act of 1964 as far as its executive personnel are concerned,[6] we hold that the Treaty does not have such effect. The right of Japanese firms operating in the United States under the Treaty to hire executives "of their choice" does not give them license to violate American laws prohibiting discrimination in employment.

The background of the Treaty does not support the expansive interpretation of the words "of their choice" urged by Sumitomo. At the time when the Treaty was negotiated, a number of American states and many foreign countries severely restricted the employment of noncitizens within their boundaries. Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 Stan. L. Rev. 947, 952-53 & n.28 (1979); S. Metzger, *International Law, Trade and Finance: Reality and Prospects* 151 (1962). The provision in Article VIII of the Treaty allowing companies of either party to engage executive personnel "of their choice" when operating in the other party's territory was a reaction to those restrictions. It was primarily intended to exempt companies operating abroad from local legislation restricting the

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6 Although Judge Tenney limited the question being certified to the narrow issue of Sumitomo's standing to invoke Article VIII of the Treaty and made it quite clear that he had not reached any opinion as to the degree of protection which Article VIII might provide from charges of discrimination under Title VII, it would be a waste of judicial resources to remand without reaching the substantive question which Sumitomo's motion to dismiss inevitably poses. The issue has been fully briefed and argued by the parties before us. Evidence concerning Sumitomo's hiring practices would not help us resolve the question. Failure to resolve the question would only open the door to a wasteful second appeal after trial below. Under these circumstances we are not limited to deciding the question formulated by the district court, *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 994-95 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); *Capital Temporaries, Inc. v. Olsten Corp.*, 506 F.2d 658, 660 (2d Cir. 1975).

employment of noncitizens. Walker, *Treaties, supra,* at 234 ("management is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from 'percentile' restrictions and the like"). See generally, Foreign Service Despatch No. 2529 from HICOG Bonn to Department of State, dated March 18, 1954 (German FCN treaty); H. Steiner & D. Vagts, *Transnational Legal Problems* 37-38 (1968).

Although the clause "of their choice" was also intended, in furtherance of the overall purpose of the Treaty, to facilitate a party's employment of its own nationals to the extent necessary to insure its operational success in the host country, no evidence supports Sumitomo's broad interpretation which, carried to its logical conclusion, would immunize a party not only from Title VII but also from laws prohibiting employment of children, § 12 of the Fair Labor Standards Act, 29 U.S.C. § 212, laws granting rights to unions and employees, Labor Management Relations Act, 29 U.S.C. §§ 141-97, and the like.

Subjecting a Japanese company to Title VII is consistent with the language and purpose of Article VIII of the Treaty, since Title VII, construed in the light of the Treaty, would not preclude the company from employing Japanese nationals in positions where such employment is reasonably necessary to the successful operation of its business. Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), expressly provides that

> "it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . national origin in those certain instances where . . . national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ."

Although the "bona fide occupational qualification" ("bfoq") exception of Title VII is to be construed narrowly in the normal context, *Dothard v. Rawlinson,* 433 U.S. 321, 334 (1977), we believe that as applied to a Japanese company enjoying rights under Article VIII of the Treaty it must be

construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company doing business in the United States, including such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business. To require the Japanese company to go forward with some evidence of bfoq status does not in our view impose undue burdens on foreign employers. In the absence of an evidentiary record on these matters, however, we cannot determine now whether all or some portion of the executive positions at Sumitomo qualify for bfoq status.

Accordingly the case is remanded to the district court for further proceedings consistent with the foregoing.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 80-7418

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of January one thousand nine hundred and eighty-one.

Present:

HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. THOMAS J. MESKILL

Circuit Judges,

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Plaintiffs-Appellees,

—v.—

SUMITOMO SHOJI AMERICA, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed and remanded in accordance with the opinion of this court with costs to be taxed against the appellant.

A. DANIEL FUSARO, Clerk

by /s/ ARTHUR HELLER
Arthur Heller,
Deputy Clerk

Judgment Entered 2/10/81
Second Circuit
Raymond J. Burghardt, Clerk

Filed U.S. District Court, S.D. of N.Y.
February 10, 1981

Filed United States Court of Appeals
Second Circuit, January 9, 1981, A. Daniel
Fusaro, Clerk

APPENDIX C

Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

June 5, 1979
77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

APPEARANCES

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TENNEY, *J.*

In this civil rights case, plaintiffs charge discrimination on the bases of sex and national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1974), and of 42 U.S.C. § 1981 (1970).[1] They seek class action status. Plaintiffs are past and present female secretarial employees of defendant Sumitomo Shoji America, Inc.[2] ("Sumitomo"). Sumitomo is an "integrated trading company"[3]

1 The complaint also includes a claim under the thirteenth amendment to the United States Constitution. As this claim apparently has been dropped, the Court sees no need to consider its merits.

2 The plaintiffs are eleven women, all of whom claim to be citizens of the United States except for one who claims to be a citizen of Japan. The complaint offers no other details of plaintiffs' claims.

3 "Integrated trading companies" engage primarily in the purchase and resale of goods, mainly in import and export markets. According to the Affidavit of J. Portis Hicks, sworn to May 18, 1978, there are fewer than a dozen integrated trading companies and these account for more than 50% of Japan's imports and exports.

incorporated in New York as a wholly owned subsidiary of a Japanese corporation. The parent corporation is not a party to this action. Plaintiffs, seeking injunctive and compensatory relief, claim that they have been restricted to clerical jobs and not trained for or promoted to executive, managerial or sales positions for which Sumitomo favors male citizens of Japan. Jurisdiction is based upon 28 U.S.C. § 1331 and § 1343.[4]

Sumitomo denies that the company discriminates and now moves pursuant to Rule12(b)(6) of the Federal Rules of Civil Procedure to dismiss the claims asserted under Title VII and section 1981. Sumitomo claims that the provisions of Title VII and of section 1981 must yield to the right of freedom of choice in employment assured by the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. 2863 (entered into force Oct. 30, 1953) ("the Treaty"). In addition to positing that Sumitomo is insulated from federal review of its employment practices by the Treaty, Sumitomo claims that plaintiffs' allegations of discrimination based on sex and national origin fail to state a claim under 42 U.S.C. § 1981.

Sumitomo also interposes four counterclaims, invoking this Court's ancillary jurisdiction essentially to seek redress for plaintiffs' alleged abuse of legal process and tortious interference with Sumitomo's business activities. Plaintiffs cross-move for dismissal of the counterclaims pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that none states a claim upon which relief can be granted and that the

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4 Reference in the jurisdictional statement to 28 U.S.C. §§ 2201 and 2202 (the Federal Declaratory Judgment Act) remains a mystery to the Court, which can discern no basis for this relief. Plaintiffs seek judgment (1) enjoining the defendant from engaging in the alleged unlawful employment practices, both current and future; (2) directing the defendant to promote plaintiffs to executive and other managerial and sales positions and to institute a training program to upgrade plaintiffs and to take affirmative action to remedy the effects of past discriminatory practices; (3) for compensatory and punitive damages; and (4) for the cost of the action with reasonable attorney's fees. Unless plaintiffs wish to enlighten the Court, the demand for declaratory relief will be stricken.

Court lacks subject matter jurisdiction. For the reasons discussed below, the motions to dismiss plaintiffs' section 1981 claim and Sumitomo's first counterclaim are granted, and the motions to dismiss the Title VII claim and the remaining counterclaims are denied.

The Treaty

On April 2, 1953 the United States and Japan entered into a Treaty of Friendship, Commerce and Navigation. The purpose of the Treaty is

> [to strengthen] the bonds of peace and friendship traditionally existing between them and [to encourage] closer economic and cultural relations between their peoples . . . by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges . . . based in general upon the principles of national and most-favored-nation treatment unconditionally accorded . . . .[5]

4 U.S.T. at 2066. The effect of the Treaty is to assure that nationals of one party are not discriminated against within the territory of the other party.[6]

Article VIII(1) of the Treaty provides, in pertinent part, that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." *Id.* at 2070. Sumitomo, in moving to dismiss the discrimination claims against it, frames the issue before this Court as whether Title VII and section 1981 of the Civil Rights Act of 1964 must yield

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5 Preface, Treaty of Friendship, Commerce and Navigation Between The United States of America and Japan (April 2, 1953).

6 *See United States v. R.P. Oldham Company,* 152 F. Supp. 818 (N.D. Cal. 1957).

to the right of freedom of choice in executive and other specialist personnel granted by Article VIII(1) of the Treaty. However, the Court finds that the issue before it is even more fundamental; that is, whether Sumitomo can invoke the aegis of the Treaty as sanction for its employment practices. The initial inquiry concerns the nationality of Sumitomo.

Article VIII(1) of the Treaty provides that Japanese and American corporations may engage within the territory of the other certain personnel of their choice. Article XXII, the definitional section of the Treaty, states in paragraph 3 that:

> [a]s used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. *Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other party.

Id. at 2079-80.[7] This is entirely consistent with traditional rules of corporate law which, for most purposes, treat a corporation as an entity distinct from its shareholders and accord to the corporation the citizenship of its place of incorporation:

> The theory of "corporate personality" permits a corporation to be regarded as a "person" with an existence—in the state of incorporation—separate from the natural persons who own it. . . . [F]or purposes of federal court jurisdiction . . . a corporation is "deemed" to be a citizen of the state by which it was created.

Hornstein, *Corporate Law and Practice* § 281 (1959) (*citing Louisville, Cincinnati, and Charleston R.R. Co. v. Letson*, 43

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7 This provision has been paraphrased by the court in *United States v. R.P. Oldham Company, supra,* 152 F. Supp. at 823:

> [B]y the terms of the Treaty itself as well as by established principles of law, a corporation organized under the laws of a given jurisdiction is a creature of that jurisdiction, with no greater rights, privileges or immunities than any other corporation of that jurisdiction.

U.S. (2 How.) 497, 555, 11 L. Ed. 353 (1844)). Sumitomo is incorporated under the laws of New York. Therefore, according to the very terms of the Treaty, Sumitomo is a company of the United States, not of Japan, and as such has no standing to invoke the freedom-of-choice provision granted by Article VIII(1) to companies of Japan within the territory of the United States.

This conclusion is supported by two district court decisions in which the 1953 Japanese-American Treaty was raised by way of defense. In *United States v. R. P. Oldham Co.*, 152 F. Supp. 818 (N.D. Cal. 1957), a wholly owned American subsidiary of a Japanese corporation was one of five corporations indicted for conspiracy in restraint of commerce in Japanese wire nails. The defendant argued that Article XVIII of the Treaty, which dealt with antitrust violations, denied the federal court jurisdiction by providing the exclusive remedy. Not only did the district court hold that Article XVIII provided a supplemental rather than exclusive remedy, but it also found that, even were Article XVIII an exclusive remedy, the California-incorporated subsidiary lacked standing to invoke this provision. The nationality of the defendant was determined by the terms of Article XXII and the traditional principles of corporate law. Moreover, the *Oldham* court found this conclusion not inconsistent with the policies underlying the Treaty:

> If [the defendant] had wished to retain its status as a Japanese corporation while doing business in this country, it could easily have operated through a branch. Having chosen instead to gain privileges accorded American corporations by operating through an American subsidiary, it has for most purposes surrendered its Japanese identity with respect to the activities of this subsidiary.

United States v. R. P. Oldham Co., *supra*, 152 F. Supp. at 823.

In *Spiess v. C. Itoh & Co. (America), Inc.*, 469 F. Supp. 1 (S.D. Tex. 1979), Judge Bue of the Southern District of Texas recently held that the 1953 Treaty did not provide the New York-incorporated subsidiary of a Japanese corporation with immunity from Title VII and section 1981. The motion before Judge Bue was essentially identical to that before this Court.

Non-Japanese employees of a wholly owned domestic subsidiary of a Japanese corporation filed suit against their employer alleging racially discriminatory employment practices. The defendant C. Itoh & Co. (America), Inc. ("Itoh-America") moved to dismiss, arguing that under the Treaty it has an absolute right to hire personnel of its choice. In a well reasoned opinion, Judge Bue held:

> Given the Treaty's own definitional terms, Itoh-America is a company of the United States for purposes of the interpretation of Article VIII(1), . . . which applies only to companies of one party within the territories of the other party. . . . Itoh-America is a United States company for purposes of Title VIII and, like other United States companies, is subject to suit on the grounds that its employment practices are racially discriminatory.

Id. at 9.[8]

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8 Itoh-America contended, as does Sumitomo, that subsequent developments and expansion of the concept of standing renders obsolete the *Oldham* analysis of the standing of corporate subsidiaries. *Citing Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), both Itoh-America and Sumitomo argue that the *Oldham* test has been implicitly overruled by a liberalized standard. In *Calnetics*, a private antitrust action was commenced against a United States-incorporated subsidiary of a West German corporation and its wholly owned American-incorporated air conditioning subsidiary. The district court found that the defendants had violated the antitrust laws and ordered, *inter alia*, a seven-year import ban in the United States of Volkswagens with factory-installed air conditioning.

The Ninth Circuit reversed the finding of antitrust violations and questioned the remedy imposed because the effect might be to discriminate against West German products in contravention of the German-American Treaty of 1954. Judge Bue has distinguished *Calnetics*, and this Court concurs in his analysis:

> Read in a light most favorable to Itoh-America, *Calnetics* stands for the proposition that a United States incorporated subsidiary of a foreign corporation has standing to raise the claim that the Treaty rights of its parent may be affected by court ordered relief. . . . In *Calnetics* the Court of Appeals determined that the import ban ordered by the trial court might discriminate against the products of VW-Germany in contravention of that company's Treaty rights. By contrast . . . Itoh-Japan [the parent company of Itoh-America] has

To avoid the conclusion that it has no standing to invoke the Treaty, Sumitomo relies upon a four-page letter submitted on November 17, 1978 by the United States Department of State to the Equal Employment Opportunity Commission ("EEOC"). The EEOC, which has submitted an amicus curiae brief here in opposition to Sumitomo's motion to dismiss,[9] has posed certain questions to the State Department. To one, "[d]oes the treaty permit subsidiaries of Japanese companies which are organized under the laws of a state of the United States to fill all its top management positions with Japanese nationals admitted as treaty traders,"[10] the State Department replied, in pertinent part:

> The phrase "of their choice" should be interpreted to give effect to [the intention that United States companies operating in Japan could hire United States personnel for critical positions, and vice versa], and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders. . . .

Letter from Lee R. Marks, Deputy Legal Adviser, Department of State, dated October 17, 1978, to Abner W. Sibal, General Counsel, EEOC.

To another question, "[i]s the situation different if the company doing business in the United States is not incorporated in the United States," the State Department replied, in pertinent part:

> no Article VIII(1) right to staff Itoh-America. Accordingly . . . even if Itoh-America has standing to invoke the Treaty rights of Itoh-Japan, it can claim no shield against application of Title VII to its own employment practices.
>
> *Spiess v. C. Itoh & Co. (America), Inc., supra,* 469 F. Supp. at 9.

9 The EEOC also filed an amicus brief in support of plaintiffs' motion to dismiss the counterclaims. *See* text *infra.*

10 *See* text *infra.*

> [W]e see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form.

Id.

Sumitomo relies upon these statements to confirm its "preferential right and privilege to hire non-immigrant Japanese nationals" under the Treaty. The Court has carefully considered the State Department letter and is mindful of the Supreme Court's admonition in *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S. Ct. 922, 926, 6 L. Ed. 2d 218 (1960), that "[w]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." *See also Factor v. Laubenheimer*, 290 U.S. 276, 295, 54 S. Ct. 191, 78 L. Ed. 315 (1933). However, in the absence of analysis or reasoning offered by the State Department in support of its position,[11] this Court does not find in the letter sufficiently persuasive authority to reject the Treaty's clear definition of corporate nationality and the consequent unambiguous meaning of Article VIII(1), or to reject established principles of corporate law and the precedents in the Fifth and Ninth Circuits.[12]

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11 It is disturbing that, in concluding that companies doing business and companies incorporated in the United States are to be treated equally under the Treaty, the State Department quotes only the first portion of the definitional section: "Article XXIII [sic] defines 'companies' as 'corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.' " The State Department neglects to quote the following sentence, which states that companies formed under the applicable laws of one of the parties are deemed companies thereof.

12 Subsequent to the filing of the district court's Memorandum and Opinion in *Spiess v. C. Itoh & Co. (America), Inc., supra*, the opinion letter submitted by the Department of State to the EEOC was brought to the attention of that court, and a motion was filed requesting certification of the March 1, 1979 Order to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1292(b).

Sumitomo also contends that it retains Japanese identity by virtue of United States regulations and guidelines adopted in connection with Article I of the Treaty, which enables nationals of either the United States or Japan to enter the territories of the other and to remain therein for specified purposes. In connection with Article I of the Treaty, section 1101(a)(15) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, provides:

> The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens . . . .
>
> . . . .
>
> (E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . .

The Department of State has promulgated regulations that an alien must satisfy in order to obtain a treaty trader visa pursuant to section 1101(a)(15)(E)(i). Among these is that if the

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Reconsidering his decision in light of the State Department letter, Judge Bue reaffirmed his holding that Itoh-America is a company of the United States under the terms of the Treaty and concluded that the opinion letter did not warrant reversal of the court's prior order.

Nevertheless, certification was granted because

> [t]he Court concludes that the March 1 Order involves a controlling question of law as to which there are substantial grounds for difference of opinion and that an immediate appeal may materially advance the ultimate determination of this litigation.

Spiess v. C. Itoh & Co. (America), Inc., 469 F. Supp. 9 (S.D. Tex. Apr. 10, 1979).

Accordingly, the following question was certified to the Fifth Circuit:

> Does the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan provide American subsidiaries of Japanese corporations with the absolute right to hire managerial, professional or other specialized personnel of their choice, irrespective of American law proscribing racial discrimination in employment?

Id. at 10.

employer is not an individual, it "must be . . . an organization which is principally owned by a person or persons having the nationality of the Treaty country." 22 C.F.R. § 41.40 (1977). The parameters of this regulation are further described in 9 FOREIGN AFFAIRS MANUAL PART II, which states: "the nationality of the employing firm is determined by those persons who own more than 50% of the stock of the employing corporation regardless of the place of incorporation."[13]

Sumitomo seizes on the regulatory standard to urge that nationality for purposes of the Treaty should be determined by the State Department guidelines, explaining that it is by interaction with Article I that the Article VIII "freedom of choice" provision is implemented. As Sumitomo is a wholly owned subsidiary of a Japanese company, by this test Sumitomo also would be a Japanese company. The Court agrees with Judge Bue who, when presented with the same argument, found that "resort to the treaty trader guidelines to determine corporate nationality for purposes of interpretation of the Treaty provisions is unwarranted in the face of the clear definitional provisions included in Article XXII(3) of the Treaty itself." *Spiess v. C. Itoh & Co., supra*, 469 F. Supp. at 6.[14] The purpose of the Treaty is to assure that Japanese

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13 The Manual is distributed to all State Department consular offices and to the offices of District Directors of Immigration.

14 The State Department guidelines are promulgated for the purpose of determining an individual's immigration status; they are not designed for the purpose of defining a corporation's juridical status. Two decisions from this district lend support to this conclusion.

In *Tokyo Sansei v. Esperdy*, 298 F. Supp. 945 (S.D.N.Y. 1969), an action for review of the determination of the district director of the Immigration and Naturalization Service ("INS") was brought by individuals who had been denied treaty trader status. Their corporate employer, a wholly owned subsidiary of a Japanese corporation, joined in the action as a plaintiff. The district court upheld the administrative determination denying treaty trader status and noted that

> the question [whether the employer has standing] is substantial. It seems likely that without the individual plaintiffs, the corporation, however great its incidental "interest" as a business matter, could not maintain the suit. And with the individuals in the case, the corporation, strictly speaking, is unnecessary. . . .

Id. at 948 n.4.

(Footnote continued)

companies operating in the United States, and vice versa, will not be discriminated against in favor of domestic corporations. Sumitomo is a domestic corporation and as such has neither standing nor need to invoke the aegis of the Treaty. Accordingly, the motion to dismiss the discrimination claims on the basis of the Treaty is denied.

The Section 1981 Claims

The second issue before the Court is whether the provisions of 42 U.S.C. section 1981[15] apply to claims alleging discrimination based on sex and national origin. The law in this circuit, as in others, is clear that section 1981 does not apply to sex discrimination. *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 377 F. Supp. 481 (S.D.N.Y. 1974), *rev'd on other grounds*, 512 F.2d 856 (2d Cir. 1975); *O'Connell v. Teachers College*, 63 F.R.D. 638 (S.D.N.Y. 1974). *See also Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610 (M.D. Pa. 1978); *Apodaca v. General Electric Co.*, 445 F. Supp. 821 (D.N.M. 1978).

Similarly, in *Nippon Express U.S.A., Inc. v. Esperdy*, 261 F. Supp. 561 (S.D.N.Y. 1966), a subsidiary of a Japanese express company sought review of the denial by the INS district director of an application made by the corporate employer on behalf of an alien employee for continuation of her status as a treaty trader. The district court concluded that

> [t]he Immigration and Naturalization Service has the responsibility for deciding [treaty trader status]. There is no merit to plaintiffs' contention that the Japanese employer itself may confer that status upon any employee it chooses.

Id. at 565.

15 Section 1981 provides:

> All persons with the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

However, there is a split of authority among the courts which have considered the question whether claims of discrimination based on national origin are actionable under section 1981—a question, it appears, that the Second Circuit has not yet addressed. *Compare, e.g., Apodaca v. General Electric Company, supra; Vera v. Bethlehem Steel Corp., supra; Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 186 (D. Md. (1977); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977); *Kurylas v. United States Department of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974), *aff'd*, 169 U.S. App. D.C. 58, 514 F.2d 894 (D.C. Cir. 1975), *with LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824 (D. Colo. 1978); *Ortega v. Merit Insurance Co.*, 433 F. Supp. 135 (N.D. Ill. 1977).

In *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1 (E.D. Pa. 1975), the court reviewed carefully the legislative history of section 1981 and concluded that the section applies to discrimination based on race and alienage only. It then characterized the alleged discrimination against Spanish surnamed individuals as based on national origin and held that no action lay under section 1981. The court held

> that the provisions of 42 U.S.C. § 1981 *are limited in their application to discrimination, the effect of which is to deny to any person within the jurisdiction of the United States any of the rights enumerated in that section, to the extent that such rights are enjoyed by white citizens of this nation. Discrimination on other grounds, such as religion, sex, or national origin, to which white citizens may be subject, as well as white non-citizens, non-white citizens, or non-white non-citizens, is not proscribed by the statute.*

68 F.R.D. at 15 (emphasis in original).[16]

16 Although the Supreme Court has not yet considered whether an allegation of national origin discrimination may be actionable under section 1981, it has extended the protection of that provision to "racial discrimination in private employment against white persons," 96 S. Ct. 2574, 2582, 49 L. Ed. 2d 493. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 287 (1976).

A few courts have held that if national origin discrimination is motivated by or indistinguishable from racial discrimination, a claim will be actionable under section 1981.[17] However, even were this Court to find the *Jones* analysis unpersuasive, on the facts of the instant action it could not equate plaintiffs' claims that they have been discriminated against because they are *not* Japanese nationals with discrimination based on their race. Indeed, from a superficial perusal of the plaintiffs' names it appears that at least one of the plaintiffs is non-Caucasian. As plaintiffs have, and are exercising, an adequate remedy for redress under Title VII, there is no need for them to strain to fit their grievances into the mold of racial discrimination. The Court concludes that the plaintiffs' allegations of discrimination based on sex and national origin are insufficient to sustain a cause of action under section 1981 and that these claims should be dismissed.

The Counterclaims

Plaintiffs cross-move pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss Sumitomo's amended counterclaims for failure to state a claim upon which relief can be granted. Sumitomo counterclaims, first, for attorney's fees pursuant to 42 U.S.C. § 2000e-5(k) and punitive damages by reason of plaintiffs' "frivolous and spurious" institution of this lawsuit "in bad faith, vexatiously, willfully and wrongfully"; second, for damages by reason of plaintiffs' alleged abuse of the federal administrative and judicial

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17 A number of courts have permitted Hispanic individuals to sue under section 1981 upon evidence that the alleged discrimination was racial in character. *See Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901 (W.D. Okla. 1977); *Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 186 (D. Md. 1977); *Cubas v. Rapid American Corp., Inc.*, 420 F. Supp. 663 (E.D. Pa. 1976). However, in *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977), an employee's allegation of discrimination based on his Slavic national origin failed to state a cause of action under section 1981. Similarly, an allegation of discrimination by a Polish-American failed to state a cause of action under this provision in *Kurylas v. United States Department of Agriculture*, 373 F. Supp. 1072 (D.D.C. 1974), *aff'd*, 169 U.S. App. D.C. 58, 514 F.2d 894 (1975).

process; third, for damages by reason of plaintiffs' common-law abuse of process; and fourth, for damages by reason of plaintiffs' tortious interference with Sumitomo's business operations.

For the reasons discussed below, the motion is granted as to the first counterclaim only. The remaining counterclaims, overlapping as Sumitomo's theories may be, satisfy the low threshold required to withstand a Rule 12(b) motion.

1. *Attorney's Fees*

Sumitomo, predicating its first counterclaim on section 706(k) of Title VII, 42 U.S.C. § 2000e-5(k), seeks recovery for attorney's fees expended to date and punitive damages for plaintiffs' wrongful conduct in commencing an allegedly spurious and frivolous Title VII action. Plaintiffs move to dismiss this counterclaim on the ground that section 706(k) will not support an independent claim for relief.

The question whether a defendant can request section 706(k) relief by way of counterclaim appears to be a novel one. The Court concludes that he cannot. Section 706(k) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." To treat this section as creating a separate cause of action is to ignore the words of the statute, which provide for reasonable attorney's fees to the *"prevailing party,"* in the context of an existing action or proceeding *"as part of the costs"* thereof. This language necessarily implies a finality that this litigation does not yet approach. Accordingly, the first counterclaim is not yet justiciable and does not state a claim upon which relief can be granted. It will be stricken without prejudice to Sumitomo's right to make later application to the Court for reasonable attorney's fees if the Title VII action is found to be frivolous or without foundation.[18]

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18 In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S. Ct. 694, 701 (1978), the Supreme Court defined the circumstances

II. *Abuse of Process*

The second and third counterclaims are based upon plaintiffs' alleged abuse of process in state and federal administrative and judicial proceedings. The gravamen of the tort of abuse of process is "misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish," Prosser, *Torts*, § 121, at 856 (4th ed. 1971), or, stated in another way, the tortious use of "legal process to attain some collateral objective." *Board of Education v. Farmingdale Classroom Teachers*, 38 N.Y.2d 397, 402, 380 N.Y.S.2d 635, 641, 343 N.E.2d 278 (1975). Sumitomo alleges that plaintiffs' purpose in bringing proceedings before administrative and judicial tribunals has been to coerce Sumitomo into acceding to their demands for work assignments for which they were unqualified and for payment of additional compensation to which they were not entitled. Such allegations clearly satisfy the intentional elements of the tort of abuse of process.

For purposes of a motion to dismiss, the court must accept the allegations of the complaint as true. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Hence Sumitomo is entitled to prove that the true intent of the plaintiffs was not legitimately to invoke the processes of the administrative agencies and the courts, but to coerce Sumitomo into yielding to their demands for promotion and higher pay. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

III. *Prima Facie Tort*

The intentional infliction of temporal damages without a legal motive—commonly referred to as prima facie tort—is a tort recognizable at law. *Smith v. Fidelity Mutual Life Insur-*

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under which an attorney's fee should be awarded when the defendant is the prevailing party:

> [A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.

ance Co., 444 F. Supp. 594 (S.D.N.Y. 1978); *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946). Its elements are: (1) the infliction of intentional harm (2) resulting in damages (3) without excuse or justification (4) by acts or series of acts that would otherwise be lawful. All must be established for the cause of action to be upheld. *Sommer v. Kaufman*, 59 A. D. 2d 843, 399 N.Y.S.2d 7, 8 (1st Dep't 1977).

In *Board of Education v. Farmingdale Classroom Teachers, supra*, the Board of Education brought an action against a teachers association and its attorney for abusing legal process by subpoenaing, with intent to injure and harass the school district, 87 teachers to compel their appearances at an initial hearing before the public employees' relations board and refusing to stagger the appearances, so that the school district was forced to hire 77 substitutes. The New York Court of Appeals held that the complaint stated a cause of action for both abuse of process and prima facie tort. Discussing the prima facie tort claim, the court stated:

> The operative fact here is that defendants have utilized legal procedure to harass and oppress the plaintiff who suffered a grievance which should be recognizable at law. Consequently whenever there is an intentional infliction of economic damage, without excuse or justification, we will eschew formalism and recognize the existence of a cause of action.

38 N.Y.2d at 406, 380 N.Y.S.2d at 644, 343 N.E.2d at 284.

Sumitomo's fourth counterclaim alleges that by the institution of vexatious federal and state administrative and judicial proceedings and by disruptive and harassing activity in the office, plaintiffs deliberately and without justification inflicted temporal and economic harm upon Sumitomo. The Court concludes that this allegation satisfies the elements of prima facie tort and states a claim upon which relief can be granted.

IV. *Section 704(a)*

Finally, both plaintiffs and the EEOC, as amicus curiae, assert that the counterclaims must be dismissed because the filing of charges before the EEOC and the bringing of a Title VII suit are absolutely privileged. As the basis for this theory, they cite section 704(a) of Title VII, which forbids "discrimination against . . . employees for attempting to protest or correct allegedly discriminatory conditions of employment." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 796, 93 S. Ct. 1817, 1821, 36 L. Ed. 2d 668 (1973).[19]

The Supreme Court has declined to resolve the issue whether "the protection afforded by § 704(a) extends only to the right of access [to the EEOC and federal courts] or well beyond it." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 71 n.25, 43 L. Ed. 12 (1975). However, the Court has stated that "[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in . . . deliberate, unlawful activity against it." *McDonnell Douglas Corp. v. Green, supra*, 411 U.S. at 803, 93 S. Ct. at 1825. In attempting to define the limits of protected conduct under section 704(a), lower courts have relied upon the *McDonnell Douglas* language to conclude that illegal activity and activity that unreasonably interferes with the employer's legitimate interests are not immunized by this provision. *See Novotny v. Great American Federal Savings and Loan Ass'n*, 584 F.2d 1235, 1261 (3d Cir. 1978); *Hochstadt v. Worcester Foundation*, 545 F.2d 222, 231 (1st Cir. 1976). In *EEOC v. Kallir, Philips, Ross, Inc.*, 401 F. Supp. 66, 71-72 (S.D.N.Y. 1975), the court stated:

> Under some circumstances, an employee's conduct in gathering or attempting to gather evidence to support his

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19 42 U.S.C. § 2000e-3(a). That section provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

> charge may be so excessive and so deliberately calculated to inflict needless economic hardship on the employer that the employee loses the protection of section 704(a), just as other legitimate civil rights activities lose the protection of section 704(a) when they progress to the point of deliverate and unlawful conduct against the employer.

The Court concludes that the cases cited above are dispositive of plaintiffs' contentions of immunity. Sumitomo alleges not only that plaintiffs instituted spurious administrative and judicial proceedings, but also that plaintiffs have been disruptive in the office, have endeavored to sabotage Sumitomo's business, have engaged in calculated acts of insubordination, have urged other employees to violate their fiduciary duties to Sumitomo and have harassed and coerced those who would not, and have attempted to "purloin" confidential corporate documents. Affidavit of J. Portis Hicks, sworn to July 11, 1978, ¶ 9. Allegations of such aggressive and hostile tactics, which must be accepted as true for purposes of a Rule 12(b) motion, cannot be dismissed on the basis of section 704(a).

Accordingly, plaintiffs' section 1981 claims and defendant's section 706(k) counterclaim for attorney's fees are dismissed. All other motions are denied.

So ordered.

APPENDIX D

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

August 9, 1979

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, *et al.*,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

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TENNEY, *J.*

In this action for redress of alleged employment discrimination both parties have filed applications directed at the Court's Opinion and Order dated June 5, 1979 which denied dismissal of the instant Complaint and certain of the counterclaims and dismissed one counterclaim and one jurisdictional base asserted by the plaintiffs. The defendant seeks an immediate appeal under 28 U.S.C. § 1292(b), asking the Court to certify for appellate review the primary question posed in its original motion to dismiss; that is, whether the defendant is exempted under the terms of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan ("the Treaty") from sanctions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") against certain allegedly discriminatory employment practices. The plaintiffs also make applications to the Court, first for a certification under section 1292(b) of the question whether their allegation of sex and nationality discrimination constitutes a valid cause of action under 42 U.S.C. § 1981, and second for reargument of this Court's refusal to dismiss certain

of defendant's counterclaims sounding in common law tort. The Court finds that only the question of the relationship between the Treaty and the civil rights law is suitable for section 1292(b) treatment. Therefore, the certification will be granted only as to that question and all other applications will be denied.

Section 1292(b) requires that a district judge

> making in a civil action an order not otherwise appealable under [section 1292 who is of] the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . shall so state in writing in such order.

The question whether defendant's employment practices are insulated from redress through civil rights actions is a pure question of law. If defendant is protected by the Treaty, it is not answerable in court to these claims of discrimination. If not, then its practices are exposed to judicial evaluation. Since there is a dearth of authority on the matter, this Court deems it prudent to follow the lead of Judge Bue of the United States District Court for the Southern District of Texas, who in *Spiess v. C. Itoh & Co. (America), Inc.*, 469 F. Supp. 1 (S.D. Tex. 1979), faced almost the identical question as is here posed and certified the following question to the United States Court of Appeals for the Fifth Circuit:

> Does the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan provide American subsidiaries of Japanese corporations with the absolute right to hire managerial, professional or other specialized personnel of their choice, irrespective of American law proscribing racial discrimination in employment?

Id. at 10. Although in contrast to *Spiess* there has been no class certification yet in the case at bar, the Court expects that the litigation will be sufficiently complicated that it would be a

waste of judicial time to try it with the novel jurisdictional question in limbo. Moreover, because the Court studied and rejected a Department of State opinion letter which construed the Treaty favorably to the defendant, *see* Opinion and Order at 9; *cf. Spiess v. C. Itoh & Co. (America), Inc., supra;* the instant matter now reflects the tension generated by the principle that "[c]ourts are to give substantial weight to the construction . . . which is placed upon the treaty by the political branch" although "they are not required to abdicate what is basically a judicial function." *Kelley v. Societe Anonyme Belge D'Exploitation de la Navigation Aerienne,* 242 F. Supp. 129, 136 (E.D.N.Y. 1965). Therefore, the Court deems it wise to seek the instruction of the United States Court of Appeals for the Second Circuit and certifies that the interpretation of the Treaty poses a controlling question of law upon which the Court and the Department of State differ, the resolution of which will materially advance the prosecution of this case.

As for plaintiffs' application to certify the question whether 42 U.S.C. § 1981 applies to these civil rights claims, the Court sees no reason to grant interlocutory appeal. Any reversal on the section 1981 issue could not be made in a vacuum and construction of the Treaty could not be avoided in reaching that decision. Therefore, immediate appeal on section 1981 would be a superfluity, for if the court of appeals finds that the Treaty does not immunize the defendant from employment discrimination suits then the Title VII avenue will be adequate for plaintiffs to press their claims, and if the Treaty is found to protect the defendant then such immunization will be invoked whether the civil rights claim is filed pursuant to Title VII or to section 1981.

Finally, the plaintiffs again ask for dismissal of counterclaims 2, 3, and 4, seeking under Rule 9(m) of the General Rules of the United States District Court for the Southern District of New York ("General Rules") to convince the Court that its refusal to dismiss those counterclaims was error. Although the Court sees nothing in plaintiffs' Memorandum of Law on Reargument that might be called "matters of controlling decisions which counsel believes the court has over-

looked," General Rule 9(m), in a Memorandum of Law submitted by the Equal Employment Opportunity Commission ("EEOC") as amicus curiae the agency argues that *Harris v. Steinem,* 571 F.2d 119 (2d Cir. 1978), controls here, and in their Reply Memorandum of Law the plaintiffs adopt the EEOC position. The Court does not agree that *Harris* is dispositive. There the complaint alleged a violation of federal securities law, and the defendants counterclaimed for libel purportedly committed in the complaint itself and on subsequent occasions in published statements by the plaintiff. The district court found that the libel charge was a compulsory counterclaim, was therefore ancillary to the court's federal question jurisdiction over the complaint, and consequently was jurisdictionally valid despite the fact that it had no independent base of federal jurisdiction. The court of appeals disagreed, holding that the libel charge was not a compulsory counterclaim measured by the rule that analyzed "whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Id.* at 123. Contrasting the issues to be proved in a securities case with those to be proved in libel, the *Harris* court found no overlap and called the logical relationship between complaint and counterclaim "at best attenuated," *id.* at 124, and dismissed for lack of jurisdiction.

This Court sees a distinction between, on the one hand, facts involving a sale of stock and a subsequent, purportedly libelous statement and, on the other hand, a claim of employment discrimination accompanied by an allegation of continuing retaliatory activity provoked by the policy complained of. In this case the defendant claims that

> prior to commencing [this action] . . . [the plaintiffs] entered into a conspiracy to coerce Sumitomo to accede to plaintiffs' unreasonable demands for assignment to work for which they were not qualified and for payment of additional compensation to which they were not entitled, and to retaliate against Sumitomo for its refusal to make such assignments or pay such additional compensation, by injuring Sumitomo in its business and trade.

Answer and Counterclaim, ¶ 19. Defendant goes on to complain that "as part of carrying out their conspiracy, plaintiffs in bad faith vexatiously, willfully and wrongfully commenced sham administrative proceedings before the Division of Human Rights of the Executive Department of the State of New York, and before the United States Equal Employment Opportunity Commission." *Id.*, ¶ 20. These are allegations that state a claim for malicious abuse of process, not—as in *Harris*—malicious prosecution. A counterclaim for malicious prosecution would be barred regardless of its compulsory or permissive nature because the tort is not actionable until the termination of the main action favorably to the defendant. By contrast, the tort of malicious abuse of process may be pleaded at any time because it does not rest on the course of a court proceeding. Moreover, the *Harris* court found that its counterclaim fell "within the well-established narrow line of decisions involving counterclaims based solely on the filing of the main complaint and allegedly libelous publication thereafter." *Id.* at 125. There is no such special niche for these counterclaims. They purport to involve pre-suit harassment by the plaintiffs and, beyond complaining of the motive behind bringing the instant case, the defendant complains of previous actions before governmental agencies brought for allegedly coersive purposes. Intimating no judgment on the merits of the counterclaims the Court adheres to its original finding that they have a logical relationship to the main action and meet the threshold test for stating a valid claim upon which relief can be granted.

The defendant's question concerning the relationship of Title VII to the Treaty is hereby certified; all other applications are denied.

So ordered.

Dated: New York, New York
August 9, 1979

CHARLES H. TENNEY
U.S.D.J.

APPENDIX E

Opinion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

November 29, 1979

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, *et al.*,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

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TENNEY, *J.*

Defendant Sumitomo Shoji America, Inc. ("Sumitomo") has moved for reargument of the Court's denial of its motion to dismiss the claims against it, Opinion and Order dated June 5, 1979, reported at 473 F. Supp. 506 (S.D.N.Y. 1979). In its June 5 decision, the Court held, *inter alia,* that Sumitomo, as a United States subsidiary of a Japanese corporation, is not exempt under Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1975] 4 U.S.T. 2063, T.I.A.S. 2863 (effective October

30, 1953) ("the Treaty"), from sanctions contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") against certain allegedly discriminatory employment practices. 473 F. Supp. at 509-13. The provision on which Sumitomo sought, and still seeks, to rely provides in pertinent part: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." Article VIII(1). In not allowing Sumitomo—a United States subsidiary—to rely on that provision, the Court looked primarily to Article XXII(3) of the Treaty. Paragraph 3 provides:

> As used in the present treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. *Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party.

(Emphasis added).

In moving for reargument of the June 5 decision, Sumitomo relies on documents recently released by the Department of State that purportedly bear on the intent of the negotiators of the Treaty. The Court grants the motion to reargue, but concludes that oral argument is unnecessary. The Court finds that the documents lend some support to Sumitomo's contentions, but does not find them sufficiently persuasive to alter its June 5 decision.

BACKGROUND

Additional Procedural Background

Pursuant to 28 U.S.C. § 1292(b), Sumitomo sought an immediate appeal of the Court's decision. The Court agreed to an immediate appeal, but limited its certification to the issue of

Sumitomo's standing under the Treaty's freedom-of-choice provision. Opinion and Order dated August 9, 1979, reported at ____ F. Supp. ____ (S.D.N.Y. 1979). Prior to filing a notice of appeal, Sumitomo requested this Court to withdraw its certification because the Department of State had on August 15 released documents that Sumitomo wanted the Court to consider. Letter from J. Portis Hicks to the Court, dated August 16, 1979. Because the ten-day period for filing a notice of appeal after certification was about to elapse, *see* Federal Rule of Appellate Procedure 5(a), Sumitomo filed its notice of appeal without waiting for action from this Court, but requested that the court of appeals stay any action until this Court had had a chance to consider the Department of State documents. On August 17, the court of appeals denied Sumitomo permission to appeal, but did so without ruling on the merits and without prejudice to renewal of the appeal after this Court had had the opportunity to consider the documents—in effect, a remand of the action to this Court. Order dated August 17, 1979 in No. 79-8460. Sumitomo subsequently moved for reconsideration of the Court's June 5 decision denying it standing under Article VIII(1). All parties have since been given the opportunity to file briefs on the effect of the Department of State documents on the Court's decision.

In its previous motion to dismiss, Sumitomo relied on an October 17, 1978 letter from the Department of State to the Equal Employment Opportunity Commission ("EEOC"). In the Department of State's view of the Treaty, as expressed in that letter, Sumitomo has the freedom of choice to fill all of its top management positions with Japanese nationals without being subject to Title VII sanctions. The Department of State drew no distinctions "between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company." *See* 473 F. Supp. at 511. The Court, in considering this letter, was mindful that the meanings given treaties by government departments charged with their negotiation and enforcement are given great weight. *Id., quoting Kolovrat v. Oregon,* 366 U.S. 187, 194 (1960). Nevertheless, it rejected the

meaning given the Treaty by the Department of State. "[I]n the absence of analysis or reasoning offered by the State Department in support of its position, this Court does not find in the letter sufficiently persuasive authority to reject the Treaty's clear definition of corporate nationality and the consequent unambiguous meaning of Article VIII(1)" or to reject established principles of corporate law and applicable precedents. *Id.* at 511-12 (footnote omitted).

During the course of the briefing on this motion for reargument, the Department of State indicated that it had changed its view on whether the first sentence of Article VIII(1) of the Treaty (freedom-of-choice provision) covers United States subsidiaries of foreign corporations. Letter from James R. Atwood, Department of State Deputy Legal Adviser, to Lutz Alexander Prager, EEOC Assistant General Counsel, dated September 11, 1979, attached, *e.g.*, as Exh. 1 to Affidavit of Lewis M. Steel, sworn to September 17, 1979. Because of the importance of this letter in the consideration of this motion, it is set out at length:

> [T]he Department has conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty, an issue in *Spiess* v. *C. Itoh & Co.* [, 469 F. Supp. 1 (S.D. Tex.), *appeal docketed,* No. 79-2382 (5th Cir. 1979),] and two other cases more recently decided in the district court in New York (*Avigliano* v. *Sumitomo Shoji America, Inc.*, [473 F. Supp. 506 (S.D.N.Y. 1979),] and *Linskey* v. *Heidelberg Eastern, Inc.*, [470 F. Supp. 1181 (E.D.N.Y. 1979)].
>
> The manner of coverage of subsidiaries is in many instances complex, making it necessary to rely on the intent of the negotiators to fully comprehend certain provisions. On further reflection on the scope of application of the first sentence of Paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover

locally-incorporated subsidiaries, and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII (1) and (4), which respectively provide for national and most-favored-nation treatment of the activities of such subsidiaries. While we do not necessarily agree with all points expressed by the Court in deciding the *Itoh* case on the question of subsidiary coverage, we do concur in general terms with the Court's reasoning, and specifically in the result reached in interpreting the scope of the first sentence of Article VIII, paragraph 1.

Arguments

The positions of Avigliano, Sumitomo, and the EEOC may be stated briefly as follows. Avigliano argues that Sumitomo has no rights under the freedom-of-choice provision in Article VIII(1). Its foreign owner gave up those rights, as far as Sumitomo is concerned, when it chose to operate in the United States as a locally incorporated subsidiary rather than as a branch. The documents, in Avigliano's view, indicate that the Treaty was designed to ensure only national treatment for foreign controlled companies. They show that the intent behind the Treaty was not to exempt such companies from United States civil rights laws.

The EEOC, in its amicus brief, argues that the September 11 Department of State letter should be given great weight by the Court. The documents should not alter the conclusion reached by the Court in its June 5 Opinion and Order: Sumitomo's rights are governed by Article XXII(3), which provides that companies constituted under the laws of a particular country shall be deemed companies of that country. Accordingly, Sumitomo may be granted no greater or lesser rights than any other domestically created company. Moreover, Article VIII(1), even were it applicable, would not allow discrimination in favor of or against Japanese nationals or anyone else. Article VIII(1)

and Title VII and section 1981 are consistent: all three prohibit discrimination against anyone.

Sumitomo argues that the Court should disregard the September 11 Department of State letter because it, like the October 17, 1978 letter expressing a contrary view, offers no authority or reasoning in support of its position. Sumitomo argues that the Court should instead rely on the Department of State documents to establish the intent of the Treaty negotiators. It relies on these documents to establish that Sumitomo has standing under Article VIII(1), as an intended beneficiary, to assert freedom of choice in hiring certain personnel. The confusion, according to Sumitomo, results from the drafters' failure to distinguish clearly between provisions defining corporate nationality and those granting specific rights. Corporate nationality is not the intended test for determining standing under the Treaty, Sumitomo continues; Sumitomo—though technically a United States company—is entitled to specific rights under the Treaty, as purportedly demonstrated by the documents, because it is foreign-owned.

Documents

The documents released by the Department of State address negotiations and enforcement of this Treaty and similar treaties with other countries. The first document on which Sumitomo relies is a Department of State Airgram, signed "Kissinger" and dated January 9, 1976, to the American Embassy in Tokyo ("Kissinger Airgram"), Exh. A to Sumitomo Memorandum. The subject was the proper interpretation of Article XXII(3) of the Treaty. Because of the differing interpretations of the Kissinger Airgram, the Court sets it out in its entirety:

> Department Legal Adviser's office has examined meaning of paragraph 3 of Article XXII of the U.S.-Japanese FCN Treaty signed at Tokyo April 2, 1953, and fully concurs with Embassy's general position as set forth.
>
> Most persuasive arguments we have found are (a) law review article on FCNs by Herman Walker, Jr., who

formulated modern (i.e., post-WW II) form of FCN treaty and negotiated many FCNs; and (b) negotiating record of U.S.-Japan FCN, especially Dispatch No. 13 from Tokyo of April 8, 1952. Both documents are enclosed. Walker cites (pp 380-81), para 3 of Japanese FCN as standard definition of company for purposes of treaty, i.e., in the standard FCN treaty "A 'company' is defined simply and broadly to mean any corporation, partnership, company or other association which has been duly formed under the laws of one of the contracting parties; that is, any 'artificial' person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit." This formulation is intended to avoid such complex questions as the law to be applied in determining company status. Every association meeting tests of valid existence must have its "company" status duly recognized and is then eligible for substantive rights granted to companies under the treaty.

In Dispatch 13 (p. 5), Jules Bassin, Legal Attache to Embassy, stated to Mr. Mikizo Nagai, Chief, Sixth Section, Economic Affairs Bureau, that "the recognition mentioned in the second sentence of paragraph 3 . . . meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party."

Thus, all that para 3 is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted, the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

For reasons stated above, argument in para 2 of reftel that nationality of a company is determined by nationality of shareholders is not correct. Rather, a company has

> nationality of place where it is established (see pp. 382-83 of Walker). However, this does not mean that [the Government of Japan] is free to deny treaty rights to U.S. subsidiary set up in Japan. While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, an American Company (i.e., one organized under U.S. law), may manage its Japanese subsidiary (i.e., a company set up under Japanese law). So too, under Article I, a U.S. national may enter Japan to direct his investment, even though the investment is a Japanese company. In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrue to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.
>
> KISSINGER

Kissinger relied on a law review article by Herman Walker, Jr., "who formulated modern . . . form of [Friendship, Commerce and Navigation Treaty] and negotiated many FCNs." *Id.* Walker set out the definition of corporate status as found in Article XXII(3) of the Treaty. "Provisions on Companies in United States Commercial Treaties," 50 Am. J. Int'l Law 373, 380-81 & n.34 (1956). He thereafter explains that

> [t]he adoption of the simple test [of status and nationality by place of incorporation] has been undoubtedly facilitated by the clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus the acknowledg-

> ment of a fact—the existence and legitimate paternity of an association—is not confused with problems associated with the functional rights and activities of alien-bred associations. . . .

Id. at 383.

Kissinger also relied, as Sumitomo now does, on a Memorandum of Conversation from the Office of the United States Political Adviser for Japan, Tokyo, Despatch No. 13, April 8, 1952 ("Despatch No. 13"), Exh. E to Sumitomo Memorandum. In Despatch No. 13, at 5, quoted in small part in the Kissinger Airgram, the following portion of a discussion of Article XXII appears:

> [The Japanese representative] asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned in paragraph 3 meant anything more than the recognition of the existence of a juridical person.
>
> [The U.S. representative] replied that "juridical status" meant "legal status", the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph 3, he added, meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party.

Sumitomo also relies on a statement of a United States negotiator concerning treaty trader employees. The negotiator stated that Japanese treaty trader employees "would not be permitted to resign from a Japanese firm in order freely to seek employment in the United States. It was possible, however, for this employee to leave one Japanese branch firm to work for an affiliate or subsidiary of that firm." Despatch No. 13, at 4. Sumitomo points to this language to demonstrate that the negotiators did not intend to distinguish between branches and subsidiaries regarding employment of treaty trader executives under the Treaty. It quotes from a document addressing a similar provision in a treaty then being negotiated between the United States and the Federal Republic of Germany.

> There is no intent . . . to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. . . . The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under . . . applicable regulations.

Department of State Instruction No. A-852 to HICOG, Bonn, January 21, 1954, at 1, Exh. 9 to Affidavit of Lance Gotthoffer, sworn to September 10, 1979 ("Gotthoffer Aff.").

Avigliano and the EEOC, in addition to arguing on the basis of the above documents, refer to other Department of State documents for the proposition that the Treaty negotiators did not seek to give foreign companies greater rights than those accorded domestic companies, but rather to ensure national treatment by barring employment discrimination against aliens. *E.g.*, Foreign Service Despatch No. 2529 from HICOG, Bonn to Department of State, March 18, 1954, at 1, Exh. 11 to Gotthoffer Aff. (the major special purpose of the freedom-of-choice provision "is to preclude the imposition of 'percentile' legislation").

DISCUSSION

Introduction

The issue on this motion for reconsideration is a narrow one. The Court is addressing the effect of the recently released Department of State documents on its June 5, 1979 Opinion

and Order. Specifically, by examining these documents, the Court seeks to determine whether, in the intent of the Treaty negotiators, Article XXII(3) bars Sumitomo from standing under the first sentence of Article VIII(1) or whether Sumitomo is otherwise barred from standing under that sentence. The issue whether Article VIII(1), if applicable, would insulate Sumitomo from review of any or all of its employment practices is beyond the scope of this opinion.

In determining whether Sumitomo has standing under the freedom-of-choice provision of Article VIII(1), the Court examines the Department of State documents and the terms of the Treaty to infer the intent of the parties to the agreement. *Maximov v. United States,* 299 F.2d 565, 568 (2d Cir. 1962), *aff'd,* 373 U.S. 49 (1963). The Court should "give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties." *Id.*

The Department of State looked to the intent of the negotiators because it found that the "manner of coverage of subsidiaries is in many instances complex." Letter dated September 11, 1979, set out *supra.* After "an extensive review of the negotiating files" on the Friendship, Commerce and Navigation Treaties, the Department of State concluded that Sumitomo lacks standing under the first sentence of Article VIII(1). Sumitomo's rights are instead governed by Article VII(1) & (4), which provides for national and most-favored nation treatment. *Id.* The Court does give some weight to the Department's view on a manner within its purview, *see Kolovrat v. Oregon, supra,* but not decisive weight in this case. The Department undoubtedly gave the question serious and thoughtful attention, but the letter indicates neither the documents on which the Department relies nor its analysis. In the absence of either, the letter little aids the Court in its determination.

The issue of Sumitomo's standing under Article VIII(1) must be resolved on the terms of the Treaty and the documents—against the backdrop of the Court's prior decision. The documents raise doubt about the intent of the negotiators on the narrow question before the Court; accordingly, they render a

decision less certain. Nevertheless, the Court concludes that Sumitomo, while not denied all protection under the Treaty, does not have standing to rely on the freedom-of-choice provision.

Sumitomo's Standing Under the Treaty Generally

The terms of the Treaty support the proposition that Article XXII(3) was not intended to bar locally incorporated subsidiaries of foreign companies from claiming any substantive rights under the Treaty. The negotiators appear to have intended a distinction between the status and nationality attributes of a company as governed by Article XXII(3) and rights a company may claim under the Treaty's substantive provisions. In other words, Article XXII(3) cannot be read to the exclusion of the Treaty's other provisions. For example, Article VI(4) provides that

> enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

Subsidiaries also have rights under Article VII(1) & (4). Under Article VII(1), nationals and parties can

> organize companies under the general company laws of such other Party, and . . . acquire majority interests in companies of such other Party; and . . . control and manage enterprises which they have established or acquired. Moreover, enterprises which they control . . . shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

Paragraph 4 of Article VII provides that "[n]ationals and companies of either Party, as well as enterprises controlled by

such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article."

The documents also support the distinction between a company's rights under the Treaty's substantive provisions and a company's nationality and status under Article XXII(3). Kissinger concluded that Article XXII(3) established a "procedural test" of an entity's status to determine "whether or not to recognize it as a 'company' for purposes of the Treaty." Kissinger Airgram. In his view, one then looks to the substantive provisions of the Treaty to determine the company's rights. *Id.* He concluded on the basis of this distinction that Japan could not deny treaty rights to a United States subsidiary set up in Japan. The substantive rights he chose as examples, however, do not support his conclusion directly. The examples all refer to the Treaty rights of nationals and companies, not to rights of the subsidiaries that they control. *See id.* Nevertheless, the distinction between "company" in the "procedural" and "substantive" senses lends support to Sumitomo's contentions.

In determining the intent of the Treaty negotiators, Kissinger looked to Herman Walker, a principal formulator and negotiator—according to Kissinger—of many Friendship, Commerce and Navigation Treaties. In the law review article quoted above—which was personal and not on behalf of the Department of State, 50 Am. J. Int'l Law at 373 n.—Walker set out the distinction between a company's civil attributes (status and nationality) and its functional or substantive ones. In a section entitled "Utilization of the Domestic Company Device," he gave a brief history of the right to organize and operate domestic companies. *Id.* at 386-88. He concluded that the treaties current at the time he was writing—including the Treaty with Japan at Article VII(1)—have revised the previous approach to rights regarding domestic companies in three ways. One revision was assuring the " 'controlled' domestic company . . . national treatment; discrimination against it in any way by reason of its domination by alien interests is not permissible." *Id.* at 388.

During negotiation of the Treaty, a United States representative suggested the same distinction between civil and substantive attributes by stating the limited purpose of Article XXII(3): "The recognition mentioned in the second sentence of paragraph 3 . . . meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party." Despatch No. 13, at 5. The same document suggests that subsidiaries have rights to hire treaty traders, *id.* at 4, as does Department of State Instruction No. A-852. The statements regarding treaty traders do not bear directly on the rights of the subsidiaries themselves, but they do suggest that subsidiaries have a place within the scheme of the Treaty and its implementing regulations. *See generally* discussion at 473 F. Supp. at 512-13.

Sumitomo's Claim of Standing Under Article VIII(1)

Articles VI(4) and VII(1) & (4), by their terms, give "enterprises in which nationals and companies . . . have a substantial interest" and enterprises controlled by nationals and companies, respectively, substantive rights. The drafter knew how to give locally incorporated subsidiaries rights under specific articles. In Article VIII(1) they did not do so. The freedom-of-choice rights are given to "nationals and companies of either Party . . . within the territories of the other Party." Because the provision does not by its own terms extend to locally incorporated subsidiaries,[1] the Court must look to Article XXII(3) to determine whether "nationals and companies" can be read to include subsidiaries. That Article provides that "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed parties thereof." By this language Sumitomo is a United States company. It is not a Japanese company and is

1 Although nationals and companies have some employment rights in connection with enterprises in which they have financial interests, the subsidiaries themselves are not in any plain terms given employment rights.

thereby ineligible for freedom-of-choice protection within the territories of the United States.

The documents do not enable Sumitomo to escape this plain-term reading of the provision. They do not establish that the negotiators intended to give locally incorporated subsidiaries rights under the freedom-of-choice provision. A liberal reading of the Kissinger Airgram and its background suggest that he might have given a locally incorporated subsidiary rights under the freedom-of-choice provision. He did not, however, explicitly conclude that a subsidiary has such rights, nor did he refer to any documents that would establish such a right running to Sumitomo. In his law review article, Walker explained the difference between the civil attributes and the functional rights of a company, but he does not indicate that domestic subsidiaries have standing under Article VIII(1). He indicates only that such companies are entitled to national treatment—discrimination against it is impermissible. 50 Am. J. Int'l Law at 380-83, 385-88. Despatch No. 13 does not even discuss Article VIII(1), and its discussion of Article XXII(3) merely supports the proposition—discussed above—that that article does not by its own terms exclude subsidiaries from all substantive rights under the Treaty. Sumitomo has failed to point out any documents that directly support its claims under Article VIII(1).

Correction of August 9, 1979
Opinion and Order

On page 3 of its Opinion and Order dated August 9, 1979, ____ F. Supp. ____, the Court stated:

> If defendant is protected by the Treaty, it is not answerable in court to these claims of discrimination. If not, then its practices are exposed to judicial evaluation.

The Court need not, and does not, reach the question whether Article VIII(1), were it available to Sumitomo, would exempt Sumitomo from judicial review against any or all of plaintiffs' discrimination claims. The Court has no view on that issue, but in the language quoted above it suggested otherwise. Accord-

ingly, it deletes the quoted language from its August 9, 1979 Opinion and Order.[2]

Additionally, the word "seeks" on page 4 (second line from the bottom) of the August 9, 1979 Opinion and Order should be changed to "sees."

CONCLUSION

In summary, the Department of State documents support the conclusion that Article XXII(3) does not bar Sumitomo from standing under the Treaty generally. However, the Court reaffirms its conclusion that the terms of the Treaty do not give Sumitomo standing under Article VIII(1) and further concludes that the documents do not establish otherwise.

Finally, the Court directs that its August 9, 1979 Opinion and Order be amended in the manner indicated herein.

So ordered.

Dated: New York, New York
November 29, 1979

CHARLES H. TENNEY
U.S.D.J.

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2 Much of the EEOC's brief is directed to the argument that the Treaty generally and Article VIII(1) specifically would not entitle Sumitomo, if it had standing, to more than national treatment. Walker, however, stated that the Treaty's employment rights "technically [go] beyond national treatment," 50 Am. J. Int'l Law at 386; *but cf. Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181, 1184-87 (E.D.N.Y. 1979) (under freedom-of-choice provision in treaty with Denmark, foreign corporation does not have absolute privilege to hire specialized personnel regardless of American laws prohibiting employment discrimination), but the Court does not reach the issue of the substantive scope of the Treaty's employment rights.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

April 24, 1981

Docket No. 79-2382

MICHAEL E. SPIESS, JACK K. HARDY and BENJAMIN F. ROUNTREE,

Plaintiffs-Appellees,

—v.—

C. ITOH & COMPANY (AMERICA), INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS.

Before:

COLEMAN, CHARLES CLARK and REAVLEY,
Circuit Judges.

CHARLES CLARK, *Circuit Judge*:

This interlocutory appeal presents an important issue of first impression in this circuit. C. Itoh & Company (America), a New York corporation wholly owned by a Japanese parent corporation, argues that a 1953 treaty between the United States and Japan permits it to hire only Japanese citizens for managerial and technical positions, in spite of American laws prohibiting discrimination on the basis of national origin. We hold that the treaty affords American subsidiaries of Japanese corporations the limited right to discriminate in favor of Japanese nationals in filling these positions.

I.

Michael E. Spiess and other American employees of C.Itoh-America filed a class action under Title VII of the Civil Rights Act and 42 U.S.C. section 1981. The complaint charged that the company had discriminated against its American employees by making managerial promotions and other benefits available only to Japanese citizens. C. Itoh-America filed a motion to dismiss, asserting that the Treaty of Friendship, Commerce and Navigation between the United States and Japan, April 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863, precluded the plaintiffs' suit. Article VIII(1) of the Treaty provides that

> companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

C. Itoh-American argued that the language permitting companies to engage executive personnel "of their choice" cloaks the company with absolute immunity from American employment discrimination laws as to these positions.

The trial court denied C. Itoh-America's motion to dismiss, relying primarily on article XXII(3) of the Treaty. Under article XXII(3),

> [c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

The trial court reasoned that C. Itoh-America, a New York corporation, had been "constituted" under the laws of the United States. As a result, the court concluded that C. Itoh-America was a "company of the United States" under the plain meaning of article XXII(3), even though it was wholly owned by C. Itoh & Company, Ltd., a Japanese corporation. Because C. Itoh-America, in this view, was not a company of one party operating within the territory of the other, the trial court ruled that it could not assert the article VIII(1) right to choose executive personnel of its choice. See *Spiess v. C. Itoh & Co. (America), Inc.*, 469 F.Supp. 1, 6 (S.D.Tex. 1979). Upon a motion by C. Itoh-America, however, the district court permitted the company to take an interlocutory appeal. The following question was certified to this court under 28 U.S.C. section 1292(b):

> Does the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan provide American subsidiaries of Japanese corporations with the absolute right to hire managerial, professional and other specialized personnel of their choice, irrespective of American law proscribing racial discrimination in employment?

II.

The Japanese Treaty is one in a long line of Friendship, Commerce and Navigation (FCN) treaties negotiated on a bilateral basis between the United States and other countries. Since the negotiation of the first FCN treaty with France in 1778, American diplomats have used the FCN device to establish the ground rules by which private commerce between American citizens and citizens of other countries is regulated.

See generally Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn.L.Rev. 805, 806 (1958) [hereinafter cited as *Modern Treaties*]. The FCN format is a flexible one, and it has been used at different times to serve different foreign policy goals. The central theme of the FCN treaty, however, has remained. An FCN treaty is the medium through which two nations provide "for the rights of each country's citizens, their property and other interests, in the territories of the other, and for the rules mutually to govern their trade and shipping." Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 Am.J.Comp.L. 229, 230-31 (1956) [hereinafter cited as *United States Practice*].

The FCN treaties, including the Japanese Treaty, are self-executing treaties, that is, they are binding domestic law of their own accord, without the need for implementing legislation. *See Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.,* 494 F.Supp. 1263, 1266 (E.D.Pa.1980). Such treaties are "the supreme law of the land," and supersede inconsistent state law. U.S.Const. art. VI, cl. II; *United States v. Pink,* 315 U.S. 203, 230, 62 S.Ct. 552, 565-66, 86 L.Ed. 796, 817-818 (1942); *De Tenorio v. McGowan,* 510 F.2d 92, 95 (5th Cir. 1975). *See also Oregon-Pacific Forest Products Corp. v. Welsh Panel Co.,* 248 F.Supp. 903, 910 (D.Or.1965) (Japanese Treaty is "supreme law of the land"). Even federal statutes "ought never to be construed to violate the law of nations if any other possible construction remains." *The Charming Betsy,* 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208, 226 (1804), *quoted in McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21, 83 S.Ct. 671, 678, 9 L.Ed.2d 547, 555 (1963). Only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern. *Id.* Thus, unless federal civil rights laws reflect an affirmative disavowal of the rights provided by the Treaty, it is our duty to implement the treaty rights.

III.

The district court held that C. Itoh-America was an American company for the purposes of the Treaty, and thus could not assert the article VIII rights extended to Japanese corporations operating in this country. In the trial court's view, "[a]rticle XXII(3) unequivocally states that for the purpose of the Treaty the nationality of the corporation is determined by the place of incorporation." *Spiess v. C. Itoh & Co. (America), Inc.*, 469 F.Supp. 1, 6 (S.D.Tex.1979). We reject this construction of article XXII(3).

The district court's reading of article XXII(3) is compatible with the text of the Treaty, but it fails to account for the unique nature of an international agreement. Unlike domestic legislation, treaties must create a common ground between differing cultures before the rights of the parties can be defined. The negotiating history of the Treaty makes clear that article XXII (3) was designed for this purpose. A contemporaneous memorandum prepared by State Department negotiators demonstrates that the provision was intended, not to determine which forms of corporate organization were entitled to assert Treaty rights, but to ensure that unfamiliar organizations would be recognized as "companies" by the legal institutions of the respective countries. The memorandum noted the following colloquy:

> Mr. Nagai [a Japanese negotiator] then asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned in paragraph three [of article XXII] meant anything more than the recognition of the existence of a juridical person.
>
> Mr. Bassin [the American negotiator] replied that "juridical status" meant "legal status," the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph three, he added, meant merely the recognition by either Party of the existence and legal

> status of juridical persons organized under the laws of the other Party.

Dispatch No. 13, Office of the United States Political Advisor for Japan, dated April 8, 1952, at 5 [hereinafter referred to as Bassin Memorandum].[1]

FCN authority Herman Walker[2] has expressed a similar understanding of article XXII(3). In a 1956 article, Walker described the "distinct problems" encountered in defining "company" broadly enough to accommodate the varied purposes of an FCN treaty. Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am.J. Int'l L. 373, 380 (1956) [hereinafter cited as *Provisions on Companies*]. Walker noted that "[t]he standard definition is exemplified by Art. XXII, par. 3, of the 1953 Japan treaty." *Id.* at 380 n.34. In this definition, Walker explained,

> [a] "company" is defined simply and broadly to mean . . . any "artificial" person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit. Every association meeting this simple test of valid existence must be accounted by the other

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1 The necessity for such a provision is well illustrated by another excerpt from the memorandum:

> Mr. Otabe inquired whether a *Zaidan Hojin* was covered by paragraph 3, and, if so, what would be the nature of national treatment accorded such organizations in the United States. He explained that a *Zaidan Hojin* is a duly organized juridical person with given property, established for the purpose of employing or disposing of said property for a given public purpose. An example of a *Zaidan Hojin,* he added, would be an endowed private library.
>
> Mr. Bassin replied such an organization would be considered a juridical person in the United States, pursuant to the provisions of paragraph 3, if it were so considered in Japan.

Bassin Memorandum, at 5.

2 A State Department cable notes that Mr. Walker formulated the modern concept of FCN treaties and negotiated many treaties on behalf of the United States. Airgram from Secretary of State Kissinger to American Embassy in Tokyo, No. A 105, dated Jan. 9, 1976. Mr. Walker also served the State Department as Advisor on Commercial Treaties. *See United States Practice, supra,* at 229.

> party a company of the party of its creation, and have its juridical status recognized without any reservation for the laws of the forum.

Id. at 380-81. Walker also emphasized that there was a

> clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus the acknowledgement of a fact—the existence and legitimate paternity of an association—is not confused with problems associated with the functional rights and activities of alien-bred associations.

Id. at 383. Thus, both the negotiators on location in Tokyo and the architect of the modern FCN treaty agree that article XXII (3) merely guarantees legal recognition to diverse forms of legal entities and does not determine which of those entities can assert treaty rights.

The Department of State has remained faithful to this interpretation of the Treaty. In a 1976 cable from Secretary Kissinger, the Department informed the American embassy in Tokyo that

> all that para 3 [of article XXII] is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i. e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted, the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

Airgram from Secretary of State Kissinger to American embassy in Tokyo, No. A 105, dated Jan. 9, 1976. A subsequent opinion from a State Department legal advisor reaches the same conclusion. Letter from Lee R. Marks to Abner W. Sibal (October 17, 1978). Thus, the consistent view of the State

Department has been that American subsidiaries of Japanese corporations are entitled to the full protection of the Treaty.[3] This view weighs heavily in our analysis.[4] *See Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S.Ct. 922, 926, 6 L.Ed.2d 218, 223 (1961).

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3 Spiess calls to our attention a State Department letter of September 1979, in which a deputy legal advisor suggests that "it was not the intent of the negotiators to cover locally incorporated subsidiaries." Letter from James R. Atwood to Lutz Alexander Prager (September 11, 1979). This letter represents the first time, to our knowledge, that the State Department departed from the position expressed in the 1952 Bassin Memorandum, the 1976 Kissinger cable, and the 1978 letter by James Atwood. For this reason, we regard it as an aberration in State Department policy.

4 C. Itoh-America argues that State Department practice in administering the immigration laws is further evidence that Japanese subsidiaries incorporated in the United States are entitled to Treaty protection. The company argues that articles I, VII, and VIII of the Treaty should be read together to create a right of "companies of Japan" to employ Japanese citizens. Article I(1) permits Japanese citizens to enter and remain in the United States "for the purpose of carrying on trade between the territories of the two Parties." In C. Itoh-America's view, this right is implemented by section 101(a)(15)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(E)(i) (1970), which grants foreign nationals special visa privileges to enter the United States as "treaty traders." The Department of State has granted treaty trader status to Japanese employees working for American subsidiaries of Japanese corporations. *See* 22 C.F.R. § 4140(a) (treaty trader must be employed by "an organization which is principally owned by a person or persons having the nationality of the treaty country"). C. Itoh-America concludes that the Department has permitted American subsidiaries of Japanese corporations to assert a right to entry under article I, and that it should be permitted to assert rights under article VIII as well.

Article I grants only a right to individuals to enter the country. C. Itoh-America can assert this right only as an adjunct of its own right to employ Japanese citizens. Thus, the argument depends on a unitary construction of articles I, VII, and VIII. The company has presented no evidence, other than the text of the Treaty and the immigration laws, that articles I, VII, and VIII were meant to be interpreted in this way. Walker lends some support to this theory. *See Modern Treaties, supra*, at 813 & n. 18. Nevertheless, because our decision that C. Itoh-America can assert Treaty rights is amply supported on other grounds, we need not, and do not, reach this issue.

Finally, we think that the district court's interpretation of article XXII(3) would create an unreasonable distinction between treatment of American subsidiaries of Japanese corporations on the one hand, and branches of Japanese corporations on the other. According to the district court, a company is considered a "company of Japan" for purposes of the Treaty only if it is incorporated in Japan. Under this analysis, American-incorporated subsidiaries of Japanese corporations would be entitled to Treaty protection only when they are specifically mentioned, and would not fall within the "companies of either Party" formula used throughout the Treaty. As the Second Circuit recently has observed, this would create a "crazyquilt pattern" in which branches of Japanese corporations would enjoy broad rights under the Treaty, while subsidiaries would be entitled only to minor protection. *See Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 at 556 (2d Cir.1981). In view of article VII's guarantee that companies shall be allowed to conduct business activities "through the medium of any form of lawful juridical entity," including both branches and locally organized subsidiaries, we agree that "[i]t is illogical to infer that the drafters of the Treaty intended to make such a dramatic distinction between forms of business operation." *Avigliano, supra,* at 556; *cf. also United States Practice, supra,* at 233 (branches and local subsidiaries treated alike in Treaty).

We are aware that other courts have disagreed with our conclusion. The district court relied on *United States v. R.P. Oldham Co.*, 152 F.Supp. 818, 823 (N.D.Cal.1957), which held that article XXII(3) precluded American subsidiaries from asserting Treaty rights. *Cf. also, Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 494 F.Supp. 1263, 1265 n. 4 (E.D.Pa.1980) (standing issue raised but not decided). While their analysis may be supported by the literal text of article XXII(3), the clearly established intent of the parties to the treaty overrides such literalism. Accordingly, we hold that C. Itoh-America, a New York corporation wholly owned by a Japanese parent, may assert all rights extended to "companies of either Party" by the Japanese treaty.[5]

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5 The dissent repeatedly characterizes our holding as a view that "the nationality of a company under the Treaty is to be determined by the

IV.

The parties also disagree as to the scope of the rights established by the Treaty. According to C. Itoh-America, article VIII(1) provides the company with an absolute exemption from American employment discrimination laws. On its face, article VIII(1) seems to confirm this view. It provides that "companies of either Party shall be permitted to engage . . . executive personnel . . . of their choice." We are mindful, however, especially after our treatment of article XXII(3), that the apparent plain meaning of a treaty provision may not always reflect the provision's actual purpose. Spiess argues that a literal reading of the "of their choice" provision would fly in the face of the Treaty's general policy. In his view, article VIII(1) provides only national treatment to Japanese corporations. After a thorough examination of the structure of the Treaty and the setting in which it was negotiated, we hold that article VIII(1) does exempt C. Itoh-America from domestic employment discrimination laws to the extent of permitting discrimination in favor of Japanese citizens in employment for executive and technical positions.

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nationality of its shareholders." *E. g., post,* slip op. at 6357, at ____. This is not the holding of the court. Rather, we assert that article XXII(3) provides no explicit definition of "company of either Party," just as it provides no definition for "national of either Party," another oft-used Treaty expression. Our conclusion that C. Itoh-America is a company of Japan for Treaty purposes is based, not on the application of an explicit test conjured up from the text of the Treaty, but on the clearly expressed intent of the parties to extend Treaty protection evenly to subsidiaries whether unincorporated or incorporated under the law of either Party. We do not reach or decide whether a corporate subsidiary in which a Japanese trader owns less than a 100 percent interest should be considered a company of Japan under the Treaty.

Under a proper understanding of our holding, Judge Reavley's views, though reasonable, lose much of their force. We agree with Judge Reavley that the Acheson and Kissinger cables belie the view that the Treaty establishes a test of corporate nationality based on the nationality of the shareholders. We disagree, however, with the suggestion that these cables convert the language of article XXII(3) into a definitive test of the Treaty term "companies of either Party."

A.

The Japanese Treaty belongs to a group of sixteen treaties negotiated in the years immediately following World War II. These treaties share the salient characteristics of FCN treaties, but they reflect several innovations designed to adapt the FCN device to the realities of modern international commerce. Thus, these treaties extended explicit protection to corporations, as well as to natural persons. *See Provisions on Companies, supra* at 380. The animating purpose of American treaties of this period was to provide a stable environment for private international investment. *See United States Practice, supra,* at 231.

Under the post-war treaties, the rights of foreign nationals operating in the host country were measured, for the most part, by two so-called "contingent standards." *Modern Treaties, supra,* at 810-11. Under the first standard, foreign nationals were guaranteed "national treatment," that is, the same treatment afforded to native citizens. The national treatment standard was viewed as a progressive one by American diplomats, and negotiators sought, whenever possible, to use it as the measure of a foreigner's rights in the host country. *Id.* The Japanese Treaty reflects this effort, and guarantees its signatories "national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities." Treaty, art. VII(1); *see also* art. III (national treatment in pension and social security laws); art. IX(1)(a) (national treatment in leasing, occupying, and using property).

The nationalistic fervor of the post-war era, however, prevented universal application of the national treatment rule. Thus, in sensitive areas where the host country could not ignore the divided loyalties of foreigners—areas such as shipbuilding, or domestic air transport—a second standard was used. Under this standard, foreign nationals were guaranteed "most favored nation" treatment, or treatment as favorable as that enjoyed by the citizens of any foreign nation. *See United States Practice, supra,* at 236. Thus, article VII(2) of the Japanese Treaty provides most favored nation treatment for

foreigners who seek to operate a public utility in the host country, or who would engage in shipbuilding, air or water transportation, deposit banking, or exploitation of land and natural resources. *See also* art. XIII (most favored nation treatment for foreign travelers entering and leaving country); art. XIV(5) (most favored nation treatment in matters of export and import).[6]

Although the two contingent standards were widely used in the post-war FCN treaties, they were not the exclusive means by which the rights of foreigners were protected. As Walker has observed, there was also "a certain margin for the play of non-contingent standards, or 'absolute' rules in the formulation of treaty provisions." *Modern Treaties, supra,* at 811. Absolute rules were intended to protect vital rights and privileges of foreign nationals in any situation, whether or not a host government provided the same rights to the indigenous population. *Id.* at 823. According to Walker, foreign nationals were to receive "not only equal protection, but also a certain minimum degree of protection, as under international law, regardless of a Government's possible lapses with respect to its own citizens." *United States Practice, supra,* at 232. The use of absolute rules is well illustrated in the Japanese Treaty. Article I permits foreign nationals to enter and leave the host country, and provides for rights of free travel, liberty of conscience, religious freedom, and other personal rights. By the same token, article II(2) provides for notification of an alien's consulate in the event he is arrested, article VI(3) guarantees the payment of just compensation for expropriated property, and article XX(a) allows nationals of one party freedom of

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6 Although the most-favored-nation standard was considered less desirable than national treatment at the time the Japanese Treaty was negotiated, it was used in previous treaties to confer special privileges on aliens. *See Modern Treaties, supra,* at 811. As a result, the national treatment and most-favored-nation standards were often used in conjunction, even in the post-war treaties, to guarantee that foreigners would benefit from the most extensive protection in every case. *See e.g.,* Treaty, art. IV(1) (companies of either party "accorded national treatment and most-favored-nation treatment with repect to access to the courts of justice").

transit by the most convenient route through the territory of the other party.

B.

Spiess argues that the "of their choice" provision of article VIII(1) should be read to grant national treatment to companies of either party. In his view, this reading would comport well with the Treaty's emphasis on national treatment; he finds it incongruous that a treaty providing for equal treatment of all parties could be used to provide special privileges to foreign nationals in the host country. This view recently was adopted by the Second Circuit in the *Avigliano* case. *See Avigliano v. Sumitomo Shoji America, Inc., supra,* at 559. A district court in the Second Circuit had previously applied the same theory to the Danish FCN treaty, which includes a similar provision. *See Linskey v. Heidelberg Eastern, Inc.*, 470 F.Supp. 1181, 1185-86 (E.D.N.Y.1979).

We agree that an overriding goal of the Treaty negotiators was to provide national treatment to foreign businesses operating in the host country. However, national treatment was not the Treaty's exclusive measure of the rights to be accorded to foreign nationals. It is apparent that article VIII(1)'s "of their choice" provision was intended, not to guarantee national treatment, but to create an absolute rule permitting foreign nationals to control their overseas investments. As we noted above, absolute rules played a significant role in defining the rights of parties. The language of article VIII(1) makes clear that the "of their choice" provision was designed to establish such a rule. Use of the phrase "of their choice" does not express the requirement that the parties are limited to national treatment. This is accentuated by the fact that the phrase "nationals of either Party shall be accorded national treatment" appears repeatedly in other provisions of the Treaty. Considering the Treaty as a whole, the only reasonable interpretation is that article VIII(1) means exactly what it says: Companies have a right to decide which executives and techni-

cians will manage their investment in the host country, without regard to host country laws.

Our understanding of article VIII(1) is reinforced by Walker and the negotiating history of the Treaty. In discussing immigration rights under the FCN treaties, Walker notes that,

> firm rights are provided for the entry and indefinite sojourn of international traders and principal investors. Though equal provision for subordinate investor-enterprise employees is not yet possible owing to lack of statutory authority, such personnel is to an extent provided for, in that management is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from "percentile" restrictions and the like.

United States Practice, supra, at 234. In a footnote, Walker identifies article VIII(1) as an example of this kind of provision. *Id.* at 234 n. 15. Walker also explains that "[i]n the matter of employment, provisions have been developed technically going beyond national treatment, to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel." *Provisions on Companies, supra,* at 386. Again, Walker identifies the Japanese Treaty as an example of this principle, and continues in a footnote to point out that article VIII(1) allows "free choice" in the selection of specialized personnel. *Id.* at 386 n. 62.

Despite the clear evidence that article VIII(1) was intended to go beyond national treatment, Spiess insists that, if it is broader, it does not go far enough beyond national treatment to immunize C. Itoh-America from American employment discrimination laws. According to Spiess, if the "of their choice" provision goes beyond national treatment, it does so only to protect Japanese companies from state laws that restrict the activities of aliens employed in the United States. In this view, article VIII(1) would protect C. Itoh-America from "ultranationalistic" state laws discriminating against Japanese citizens, but not from federal laws forbidding the company

itself to discriminate. In much the same vein, the Second Circuit held that the Treaty could be interpreted to be consistent with the nation's employment discrimination laws. *See Avigliano, supra,* at 559. The Equal Employment Opportunity Commission also raised this possibility in an amicus curiae brief submitted in this case. Under this theory, the Title VII exemption for bona fide occupational qualification (bfoq) requirements is broad enough to encompass any rights that Japanese corporations legitimately could assert under the Treaty.

Although the Treaty and commentary offer some support for this point of view, the argument misapprehends the nature of a right created in the course of international bargaining. From the American perspective, the Japanese Treaty was "intended primarily to facilitate American private-sector investment in foreign nations." *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.,* 494 F.Supp. 1263, 1267 (E.D.Pa.1980); *Avigliano, supra,* at 556; *see United States Practice, supra,* at 231. The article VIII(1) right to free choice of technical and managerial personnel sought to ensure that the American businessman's investment in the host country would remain within his control. The legislative history cited to us by C. Itoh-America demonstrates that the Senate, in consenting to ratification of the Treaty, was concerned about the right of American companies to use American personnel to control their investments in Japan. *See Commercial Treaties—Treaties of Friendship, Commerce & Navigation, with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany, and Japan: Hearings before the Subcom. of the Senate Comm. on Foreign Relations,* 83d Cong., 1st Sess. 2, 3, 6-9 (1953). It is self-evident that this same goal of American negotiators in formulating article VIII(1) was the goal of Japanese negotiators who sought it to protect Japanese companies operating in the United States.

Clearly, article VIII(1) provides some right to Japanese companies to manage their own affairs.[7] It is irrelevant

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7 Even *Avigliano* concedes that "the clause 'of their choice' was also intended, in furtherance of the overall purpose of the Treaty, to

whether the source of potential interference with that right is state legislation characterized as "ultranationalistic" or a federal statute labeled "progressive." The right of Japanese companies to choose essential personnel is a right to maintain Japanese control of the overseas investment. To make this right subject to Title VII's bfoq requirements, or to interpret it to override only state law, would render its inclusion in the Treaty virtually meaningless. Thus, we hold that the article VIII(1) "of their choice" provision permits Japanese companies to discriminate in favor of their fellow citizens.[8]

Title VII was enacted after the Treaty, and thus might be thought to nullify inconsistent principles of domestic law created as a by-product of the Treaty. The general rule is that subsequent federal legislation will invalidate treaty obligations if the congressional intent to do so is clearly expressed.[9] *See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 21, 83 S.Ct. 671, 678, 9 L.Ed.2d 547, 555

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facilitate a party's employment of its own nationals to be the extent necessary to ensure its operational success in the host country." *Avigliano, supra,* at 559.

8 Spiess suggest that implementation of the article VIII(1) right would permit companies like C. Itoh-America to violate, not only Title VII, but also labor relations statutes and laws preventing exploitation of workers and practices such as child labor. The Second Circuit has expressed a similar concern. *See Avigliano, supra,* at 559. C. Itoh-America, on the other hand, argues that the "of their choice" provision entails a broad immunity from all domestic employment legislation. The extent to which this principle applies outside the context of national origin discrimination is unclear. *See* Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 Stan.L.Rev. 947, 955 (1979). We need not decide in today's case whether the article VIII(1) right extends beyond discrimination in favor of Japanese nationals in executive and technical positions, supervisory jobs which would hardly be filled by union members, minors or exploited workers. We note only that article VIII(1) is based on the principle of home office control of the foreign investment.

9 Spiess and his fellow plaintiffs filed suit under section 1981 as well as under Title VII. Because the Treaty was ratified after the enactment of section 1981, it supersedes the federal statute. *See Hijo v. United States,* 194 U.S. 315, 324, 24 S.Ct. 727, 729, 48 L.Ed. 994, 996 (1904).

(1963). No evidence suggests that Congress intended to repudiate article VIII(1) when it enacted Title VII. Domestic employment discrimination laws occupy a high priority on the nation's agenda, and courts often resolve statutory conflicts in their favor. In this case, however, resolving doubts in favor of Title VII would go beyond the judicial sphere of interpretation. In the absence of congressional guidance, we decline to abrogate the American government's solemn undertaking with respect to a foreign nation.

Spiess raises an additional argument which merits attention. He contends that any right to discriminate afforded by the Treaty is contrary to the Charter of the United Nations and thus is invalid because it is in conflict with higher law. Spiess points out that article 55 of the Charter encourages "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Spiess argues that this language prohibits the United States and Japan from agreeing to allow each other's businesses to hire fellow citizens when operating in the other country.

We note initially that the national origin distinction at issue in this case does not fall within the enumerated categories of "race, sex, language or religion." In any event, the Charter of the United Nations, although adopted by the United States, is not a self-executing international obligation. *Hitai v. Immigration and Naturalization Service,* 343 F.2d 466, 468 (2d Cir. 1965); *Davis v. District Director, Immigration and Naturalization Service,* 481 F.Supp. 1178, 1183 n. 7 (D.D.C.1979). Spiess argues that even though the Charter is not self-executing, Title VII was enacted to implement its provisions, and thus partakes of the *lex superior* characteristics of the Charter. We do not agree. Title VII is legislation independent of the Charter. It was enacted in the domestic interest of the nation. It thus possesses no overriding authority and does not, of its own accord, invalidate antecedent treaty obligations of the United States.

V.

In summary, we hold that C. Itoh-America may assert article VIII(1) rights under the Treaty, and that those rights permit it to hire only Japanese personnel for executive and technical positions. The opinion of the district court is reversed, and the case is remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

REAVLEY, *Circuit Judge,* dissenting:

The majority opinion concludes that C. Itoh-America is exempt from the requirements of Title VII of the Civil Rights Act of 1964 because article VIII(1) of the FCN Treaty between Japan and the United States grants to "companies of [Japan]" the right to hire executive and technical personnel "of their choice." Obviously, this conclusion depends upon the finding that a company incorporated in the United States and doing business here is nevertheless a "company of Japan" merely because it is owned by a Japanese parent corporation. In my view, the drafters of the Treaty created in article XXII(3) a precise definition for the term "company of [Japan]," clearly stating that a corporation has the nationality of its place of incorporation. That interpretation of the article is consistent with the other provisions of the Treaty, while the majority view creates substantial inconsistencies and redundancies. Furthermore, secondary sources of the highest authority support the conclusion that C. Itoh-America is a company of the United States and not of Japan.

I. The Article XXII(3) Definition

The drafters of the Treaty wanted to distribute the benefits of commercial exchanges between the United States and Japan broadly and expediently. In choosing the terminology of the document that would achieve this end, they faced the historical

and cultural fact that Japan and the United States had developed widely diverse forms of commercial organization.[1] The drafters thus chose to avoid problems of semantics by adopting only two basic terms of art to describe the commercial entities indigenous to each nation: "nationals of either Party" and "companies of either Party." The term "nationals" obviously covers individual businesspersons and entrepreneurs having United States or Japanese citizenship. The term "companies" is specifically defined in article XXII(3) of the Treaty to include *every* form of business association: "As used in the present Treaty, the term 'companies' means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." Article XXII(3). The Treaty also recognized a third form of business entity that is likely to come into existence when, for example, a national or company of Japan[2] enters the United States under the broad commercial and legal rights established by the Treaty. That third entity is the individual proprietorship or company (in the broad Treaty sense) that is *formed in the United States,* does business here, and yet is owned and controlled, in whole or part, by a national or company of Japan. The treaty's term of art for this third form of international commercial activity is "enterprises controlled by nationals and companies of [Japan]."[3] The Treaty generally distributes rights among private parties by specific reference to one or more of these three forms of commercial entities.

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1 For example, the Bassin Memorandum records an exchange between Mr. Bassin and Mr. Otabe, one of the Japanese representatives, as to whether a *zaidan hojin* would be considered a "company" under the Treaty. A *zaidan hojin* is a juridical person charged with the duty of using or employing certain property for a public purpose, such as an endowed public library. Bassin Memorandum at 5.

2 I will not attempt to use neutral terms at all points but will occasionally discuss the Treaty only in terms of the right it confers upon Japan to do business in the United States. I adopt this convention for simplicity of expression and because that choice embodies the specific legal question we face in this case.

3 See the Treaty sections quoted in notes 6-10 below.

But the term "company of [Japan]" is not completely defined merely by saying that every form of business association shall be deemed a company under the terms of the Treaty. Thus article XXII(3) continues in a second sentence to specify, first, the test of when a corporation may claim nationality from either Japan or the United States and, second, when a juridical entity entitled to be called a "company" comes into existence: "Companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party" (emphasis added).

The first purpose of this sentence, to define a test of corporate nationality, is addressed by the simple phrase placed in italics. The second purpose, to define the creation of a juridical entity that must be recognized as a "company", is addressed by the remainder of the sentence after the italicized phrase. The two purposes become conceptually muddled, especially in some of the documents cited by the majority, only because they coincide in one event: when either nation creates a company under its own laws, that company has the nationality of the creating nation and must be recognized as a juridical entity by the other nation.

The primary flaw in the majority's analysis is that it ignores the existence of the phrase "shall be deemed companies thereof" in article XXII(3). The majority argues that the only purpose of this article is to determine when the juridical entity designated as a "company" exists. I agree that is *one* purpose of the article, but the phrase "shall be deemed companies thereof" is totally unnecessary to that end. What is the meaning of this phrase if not to determine corporate nationality for the purposes of the Treaty? If the majority rejects the plain meaning of this phrase, it has three initial problems. The first is to say what this phrase *does* mean. The second is to explain how the drafters could fail to specify an answer to a question as important as the determination of corporate nationality,[4] for

4 The importance of the term "company of [Japan or the United States]" is shown by the fact that it is used at least 40 times in the

the issue is certainly addressed nowhere else in the Treaty or Protocol. The third problem is that the majority must justify its own conclusion that the nationality of a corporation is to be determined by the nationality of some unspecified percentage of shareholders,[5] because this test is only one of several other possibilites, and the majority cites no authority for its own choice. For instance, an international corporation could claim nationality based upon place of incorporation, nationality of shareholders, place of principal office, place of principal assets, derivation of income, or any combination thereof. International law has for many years resolved this complex question with the principle that an international corporation has the nationality of its place of incorporation.[6] Article

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Treaty and Protocol. Article XXI(1)(e) is another indication that the drafters were highly sensitive to the issue of corporate nationality. That section addresses the possibility that nationals of third countries might try to gain Treaty rights illegitimately merely by incorporating in Japan or the United States. That article is fully discussed in section II.B. of this dissent.

5 The majority states in footnote 5 of their opinion that they do not mean to establish a general test of corporate nationality under the Treaty. This may reserve a question of *degree* or *quantity*, but the effect of their construction of the Treaty is nevertheless to derive the nationality of a company from the nationality of the controlling shareholders.

If the majority means to imply that they might reach a different test of corporate nationality if a company were only 70% (or 51% or 40%) owned by Japanese interests, they make the Treaty even more ambiguous and vague.

6 The principle was clearly stated in the celebrated decision of the International Court of Justice in Barcelona Traction, Light and Power Company, Limited *(Belgium v. Spain)*, 1970 I.C.J. Rep. 3, 42:

> In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments.

(footnote continued on next page)

XXII(3) certainly appears to follow this well established principle and if the majority rejects that view, it must justify its own choice.

II. Analysis of the Treaty Structure and Articles

Anyone doubting that article XXII(3) was intended to specify that a corporation has the nationality of its place of incorporation should examine the Treaty structure and the internal consistency of the other articles. The results of such an analysis confirm that article XXII(3) means exactly what it says.

A. The Basic Terms of Art

To begin with the basic semantics of the Treaty, the drafters consistently used three terms of art to allocate benefits among private parties, "nationals of [Japan or the United States]," "companies of [Japan or the United States]," and "enterprises controlled by such nationals or companies." The very creation of these three terms of art is a strong indication that the drafters viewed each as representing a distinct entity. Yet under the majority view a company incorporated in the United States but controlled by a Japanese national or company (which I will refer to as a "Japanese-controlled American company") is already a "company of Japan." That view equates the latter two terms, deprives the last term of all meaning and purpose, and creates the additional confusion and redundancy that I will discuss below.

B. Provisions Based on the Place of Incorporation Test

Two articles of the Treaty are clearly based on the assumption that a company has the nationality of its place of incor-

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Dr. Herman Walker, the FCN authority so heavily relied upon by the majority, has called this the "simple 'classical' test" of corporate nationality. H. Walker, *Companies*, ch. VII, in R.R. Wilson, *United States Commercial Treaties and International Law* 182, 193 (1960).

poration. The first is article VII(1), which the State Department identified as the "heart of the treaty." Airgram from the State Department to the American Embassy in Tokyo, No. A 453, dated January 7, 1952. The first sentence of that article says,

> "Nationals and companies of [Japan] shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial, and other business activities within the territories of the [United States], whether directly or by agent or through the medium of any form of lawful juridical entity."

The final sentence says,

> "Moreover, enterprises which [nationals and companies of Japan] control, whether in the form of individual proprietorships, companies, or otherwise shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of [the United States]."

There is a subtle difference between the degree of rights conferred by these two sentences. The first sentence says that nationals and companies of Japan doing business within the United States are entitled to equality of treatment with nationals and companies of the United States, expressed in the term of art common to such treaties, "national treatment." The second sentence, however, does not confer simple "national treatment" on Japanese-controlled American companies, but a narrower right: equality of treatment with subsidiary enterprises controlled by nationals and companies of the United States. I will call this "national subsidiary treatment." This specific grant of a narrower right to Japanese-controlled American corporations makes sense only if such a corporation is a company of the United States. If it were already a company of Japan, it would have gained full "national treatment" from the first sentence of article VII(1), which would defeat the subsequent grant of a narrower right.

Article XXI(1)(e) of the Treaty also indicates that the nationality of a corporation is normally to be determined by its place of incorporation. This article provides as follows:

> The present Treaty shall not preclude the application of measures . . . denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts of justice and to administrative tribunals and agencies.

I read this to mean that, although a company incorporated in Japan may normally claim all the privileges of a "company of Japan" while doing business in the United States, if the United States discovers that nationals of a third country own the Japanese company, the United States may deny the benefits of the Treaty to such company, with the listed exceptions. For instance, if a company incorporated in Japan is in fact owned and controlled by North Korea, the United States may "pierce the corporate veil" and prevent North Korea from gaining broad commercial rights within the United States by such devious means. If the majority were correct in saying that a corporation under the Treaty has the nationality of its controlling shareholders, a Japanese company controlled by nationals of North Korea would not be a company of Japan to begin with, and there would be no need for this explicit and exceptional reservation of authority by both countries.

C. Specific Inclusions of Controlled Enterprises

Under normal principles of statutory interpretation, if a party or item is specifically enumerated in one section of a statute but omitted from a similar enumeration in a closely-related section, the exclusion is held to be intentional and meaningful unless plain reason or authoritative sources indicate otherwise. Articles VII(1),[7] VII(4),[8] XVI(2),[9] VI(3) (read

7 Article VII(1) reads as follows:

in conjunction with paragraph 2 of the Protocol),[10] and VI(4)[11] grant express rights to "nationals and companies of either

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Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, *enterprises which they control, whether in the form of individual proprietorships, companies or otherwise,* shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party (emphasis added).

8 Article VII(4) reads as follows:

Nationals and companies of either Party, *as well as enterprises controlled by such nationals and companies,* shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article (emphasis added).

9 Article XVI(2) reads as follows:

Articles produced by nationals and companies of either Party within the territories of the other Party, *or by companies of the latter Party controlled by such nationals and companies,* shall be accorded therein treatment no less favorable than that accorded to like articles of national origin by whatever person or company produced, in all matters affecting exportation, taxation, sale, distribution, storage and use (emphasis added).

10 Article VI(3) reads as follows:

Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

Article VI(3) is extended by paragraph 2 of the Protocol, which was specifically incorporated into the Treaty as follows:

Party" operating in the territory of the other party and then *specifically extend* the same or similar rights to "enterprises controlled by such nationals or companies." Other articles that are directly adjacent, including the article VIII(1) provision upon which C. Itoh-America seeks to rely, extend rights only to "nationals and companies of either Party" and make no mention of controlled enterprises. This is especially significant in relation to article VIII, which the State Department considered the "companion" to article VII. Airgram from the Department of State to the American Embassy in Tokyo, No. A 453, dated January 7, 1952. The majority would interpret such distinctions as being purely haphazard. I am unable to accept that view when the negotiating documents and historical context of the Treaty indicate that it was crafted with the greatest care.

Furthermore, the specific inclusion of controlled enterprises in the five articles listed above becomes completely redundant if Japanese-controlled American companies are already companies of Japan, because in each article the right has previously been extended to companies of Japan. One could argue that the additional extension of the rights to controlled enterprises

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The provisions of Article VI, paragraph 3, providing for the payment of compensation shall extend to *interests held directly or indirectly by nationals and companies of either Party* in property which is taken within the territories of the other Party (emphasis added).

11 Article VI(4) reads as follows:

Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraph 2 [relating to the right to be free from unlawful entry, molestation, and search] and 3 [relating to right to be free from condemnation of property except for a public purpose, and right to compensation therefor] of the present Article. Moreover, *enterprises in which nationals and companies of either Party have a substantial interest* shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control (emphasis added).

in these five articles was only done out of an excess of caution, to address a perceived ambiguity or possible misunderstanding. Yet if that were the case, surely the drafters would have either exhibited the same caution in adjacent articles, such as article VIII(1), or devoted similar effort to correct the ambiguity at its source, by specifying that a Japanese-owned American company is nevertheless a "company of Japan." The majority sees a "crazyquilt pattern" in the Treaty if a Japanese-controlled American company is not a company of Japan, a characterization that I dispute in the next part of this dissent. But the majority has its own "crazyquilt pattern" to explain in these five Treaty articles that, under the majority view, blatantly duplicate grants of rights.

D. The Pattern of Rights Distribution

The numerous redundancies and ambiguities discussed above are all created by the distortion of article XXII(3) urged upon us by the majority. In contrast, if we simply read that article in accord with its plain meaning, all of these problems disappear and each of these sections becomes a concise, appropriate, and meaningful extension of valuable rights to American business enterprises controlled by nationals or companies of Japan. But the majority maintains, along with the Second Circuit in *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), that this reading of article XXII(3) "would create a 'crazyquilt pattern' in which branches of Japanese corporations would enjoy broad rights under the Treaty, while subsidiaries would be entitled only to minor protection." The majority finds it "illogical to infer that the drafters of the treaty intended to make such a dramatic distinction between forms of business operation," quoting *Avigliano*, 638 F.2d at 556.

I find these generalities either inaccurate or too broad. First of all, if the rights conferred on companies of Japan by this Treaty were assigned a weighted value, one right would probably far outweigh all others: the article VII(1) grant of "national treatment with respect to engaging in all types of . . . business

activities." Article VII(1) specifically extends this right of national treatment to Japanese-controlled American companies, in a narrower form of little practical significance.[12] It is therefore inaccurate to say that such a company gains only "minor protection" from the Treaty. The broadest and most important right granted by the Treaty, outweighing all others combined, is shared on a virtually equal basis by companies of Japan and their American subsidiaries.

Secondly, a close examination of the Treaty shows that the "crazyquilt pattern" seen by the majority is not as dramatic as they seem to think. Only about 20 paragraphs of the Treaty confer rights on "companies of [Japan]" without specifically extending the same right to American enterprises controlled by such companies.[13] Almost all of these 20 paragraphs confer rights that would fall into one or more of the following categories:

(1) The right is so essential to the conduct of business activities that any reasonable interpretation of the Treaty would hold it to be already conferred on American subsidiaries of Japanese companies by the general article VII(1) grant of "national subsidiary treatment" in all business activities;[14]

(2) The right is separately protected by the Constitution of the United States, and could therefore never be denied to an American subsidiary of a Japanese corporation under any circumstances;[15]

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12 See the discussion in part II.B. above.

13 See articles IV(1), (2); V(1); VI(1), (2); VIII(1), (3); IX(1), (2), (3), (4); X; X(1), (3), (4); XII(1), (4); XIV(5); XV(2); and XVII(2).

14 See, e.g., articles IX(1) (right to lease land and buildings appropriate to conduct of activities otherwise permitted under Treaty), IX(2) (right to acquire movable property), IX(4) (right to dispose of property), and XI(1) (right to be taxed on a basis equal to national corporations).

15 See, e.g., articles IV(1) (right of access to courts and administrative bodies), VI(1) (right to protection of property within the host country), VI(2) (right to be free from unlawful entry, molestation, and search), and IX(3) (right to dispose of property within 5 years if laws of testate or intestate succession prevent national treatment).

(3) The right is so fundamental to the design of our commercial and legal system that it would never be denied to American subsidiaries of United States companies, and therefore could not be denied to American subsidiaries of Japanese companies because of the article VII(1) grant of "national subsidiary treatment."[16]

I have cited examples in footnotes. My point is only that the Treaty rights of a company of Japan and its American subsidiary are virtually identical *in practice.* I acknowledge that the conceptual structure of the Treaty is not entirely apparent or logical in relation to these 20 paragraphs.[17] But the distinctions make little *practical* difference.

I can identify only one provision of the Treaty that, in practical and significant terms, is likely to cause a divergence between the Treaty rights of a Japanese-controlled American company and its Japanese parent corporation. That one provision is the article VIII(1) right from which C. Itoh-America seeks protection in this litigation. Assuming that article VIII(1) does, in fact, grant to "companies of [Japan]" an exemption from the requirements of our civil rights legislation,[18] then a Japanese-incorporated company doing business in the United States may discriminate in favor of its Japanese managerial and technical employees to the detriment of American employees,[19] while the American-incorporated subsidiary of that same

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16 See, e.g., articles XII(1) (right to transfer funds and instruments outside the United States), XIV(5) (right to import and export), XV(2) (right to have an appeals procedure from administrative decisions in relation to customs matters), and XVII(2) (right of national treatment in access to government sales, contracts, and concessions).

17 But as I noted in section II.C. above, the majority's view creates equal or greater illogic in the Treaty.

18 Under my analysis, we would have no need to reach this question.

19 For instance, C. Itoh-America currently classifies its employees into a "Japanese staff" and an "American staff." Over 90% of management-level positions are filled exclusively by the Japanese staff. The Japanese staff also receives higher salaries, benefits, and bonuses than

company would not be able to so discriminate under my interpretation of articles XXII(3) and VIII(1). This is really the only point at which the majority's "crazyquilt pattern" emerges in practice.

Thirdly, if article VIII(1) and perhaps a few other articles do confer a superior degree of rights upon companies of Japan and not upon their American subsidiaries, I do not view this as an "illogical . . . distinction." It is very reasonable that the two nations would reserve the most extraordinary degree of Treaty protection only for business enterprises created under their own laws, and would allow enterprises created under the laws of the other party to be subject to those laws on a basis equal to all other companies of that party. If a company of Japan wishes to safeguard a few superior legal rights under the Treaty, it may choose to do business in the form of a branch office. But if the Japanese company seeks to gain the additional tax and legal benefits that our laws confer on American-incorporated companies, they will create a separate legal entity under the aegis of American law. The line between Japanese incorporation and American incorporation is a bright and distinct one. If Japanese investors choose to cross that line in order to gain *all* the benefits of our legal system on a basis equal with American corporations, I find it eminently reasonable that they accept legal responsibilities and duties on an equal basis as well.

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counterparts on the American staff. All federal, state, and local taxes on these greater benefits are paid by the company.

Some of these practices may be justified by the need of Japanese investors "to control and manage enterprises which they have established or acquired." Article VII(1). That right is guaranteed by the Treaty in absolute terms, and United States law may not infringe upon that right unless there is a clear Congressional intent otherwise. If some of C. Itoh-America's discriminatory practices are protected by article VII(1), I suspect that they could also claim protection from the BFOQ exception to Title VII. But these are questions that should be determined at trial.

III. Secondary Sources of Interpretation

My analysis up to this point has been based entirely on the language and structure of the Treaty itself. In contrast, the majority relies entirely on four secondary sources. It is certainly proper to use such sources, *Block v. Compagnie Nationale Air France,* 386 F.2d 323, 336-38 (5th Cir. 1967), but they should not be read selectively. For instance, the majority does not discuss a dispatch that Secretary of State Dean Acheson sent at the height of the Treaty negotiations to the American Embassy in Japan (hereinafter cited as the Acheson dispatch) with the heading "FCN Treaty. Interpretation of Certain Provisions." The Acheson dispatch was a response to a previous telegram from the embassy asking a set of questions that are not available to us now. From the tone of the Acheson dispatch, the contents were apparently intended to be delivered to the American negotiators and interpreted to the Japanese representatives. The first paragraph of the dispatch seems to be an attempt to clarify the purpose of article XXI(1)(e), an exception to the general test of corporate nationality, which I discuss in part II.B. above. That paragraph reads as follows:

> The analysis of this question begins with the second sentence of Article XXII, Paragraph 3, which establishes that whether or not a juridical entity is a "company" of either Party, for treaty purposes, *is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded.* (Emphasis added).

I cannot imagine a more authoritative or explicit rejection of the majority's view that the nationality of a company under the Treaty is to be determined by the nationality of its controlling shareholders.

Secretary Acheson's view was strongly confirmed twenty-four years later by a State Department dispatch from Secretary of State Henry Kissinger. In the summer of 1975, the American Embassy in Tokyo was involved in discussions with the Government of Japan regarding the Treaty status of an American-

owned Japanese company—the mirror image of the question we face. The Japanese government had taken the position that such a company had Japanese nationality and was thus excluded from Treaty benefits inside Japan. The American embassy had argued in response that the nationality of a majority of the shareholders determined the nationality of a corporation—exactly the position taken by the majority opinion here. Telegram from the American Embassy in Tokyo to the Department of State, Tokyo 11177, dated August 15, 1975. Secretary Kissinger and the State Department explicitly rejected the embassy's view in the reply dispatch of January 1976. The airgram first contains the general language quoted by the majority to the effect that article XXII(3) is only "meant to accomplish . . . the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a 'company' for purposes of the treaty." The Secretary then continues with more specific language omitted by the majority opinion:

> For reasons stated above, argument in para 2 of reftel [the embassy's original telegram of inquiry] that nationality of a company is determined by nationality of shareholders is not correct. *Rather, a company has nationality of place where it is established* (see pp. 382-83 of Walker) [referring to the Herman Walker article cited in the majority opinion as *Provisions on Companies*]. However, this does not mean that GOJ [Government of Japan] is free to deny treaty rights to U.S. subsidiary set up in Japan. While the *company's status and nationality are determined by place of establishment,* this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, *an American company (i.e., one organized under U.S. law),* may manage its Japanese subsidiary (i.e., a company set up under Japanese law). . . . In sum, the substantive rights of U.S. na-

> tionals and companies vis-a-vis their Japanese investments accrue to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, *the status and nationality of the investment are determined by the place of its establishment.* (Emphasis added).

Airgram from Secretary of State Kissinger to American embassy in Tokyo, No. A 105, dated Jan. 9, 1976 (hereafter cited as the Kissinger dispatch).

Secretary Kissinger was arguing against two extreme views, the Japanese government's view that the American-owned company incorporated in Japan had *no* rights under the Treaty, and the embassy view that an American-controlled Japanese company was still a company of the United States. Speaking to the Japanese government's view, Secretary Kissinger states that the definition of "company" in article XXII(3) does not deny rights under the Treaty. Of course it is quite accurate to say that a definition does not create or deny substantive rights, but it inherently limits the *scope* of rights conferred in other, substantive sections of the Treaty. Rejecting the extreme positions taken by the Government of Japan and the American embassy, Secretary Kissinger chose the middle view that conforms with the plain meaning of article XXII(3): an American-owned company incorporated in Japan is a "company of Japan" but still has the specific rights expressly granted to controlled enterprises by other sections of the Treaty, most notably the article VII(1) grant of national subsidiary treatment. I would apply that same analysis to C. Itoh-America.

The four secondary sources relied upon by the majority opinion are pale authority compared to such explicit statements by Secretaries of State Acheson and Kissinger. A careful reading of the first of these authorities, the Bassin Memorandum, shows that the writer was discussing article XXII in the context of a specific question from one of the Japanese negotiators about what "juridical status" meant as used in the article. Mr. Bassin answered only that limited question, and the

subject of corporate nationality never came up because it is discussed in a separate and independent phrase of the article. Recognition of a juridical entity and ascription of its nationality are separate questions, and the Bassin Memorandum, quite simply, never addresses the latter.

The second authority cited by the majority opinion is a pair of statements by FCN authority Herman Walker. I read the first of these passages as direct and unambiguous support for the place-of-incorporation test:

> "Every association meeting this simple test of valid existence [acknowledgment by the state under whose laws the corporation was created] must be accounted by the other party *a company of the party of its creation,* and have its juridical status recognized without any reservation for the laws of the forum" (emphasis added).

Provisions on Companies at 380-81. The Kissinger dispatch cites the same article by Dr. Walker as authority for this view, and the article as a whole clearly supports the place-of-incorporation test. *Id.* at 380-82. The second Walker quotation is, like the majority's quotation from the Kissinger dispatch, directed at a question that is different from the one we face. Dr. Walker states that "[t]he recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits." *Id.* at 383. No party to this suit has argued that the definition of corporate status and nationality in article XXII(3) creates substantive rights, but, as discussed above, a statutory definition inherently limits the *distribution* and *scope* of rights created elsewhere. The majority's quotations from Dr. Walker are entirely consistent with my interpretation of article XXII(3).

The final authorities relied upon by the majority are the 1976 cable from Secretary Kissinger and the October 1978 letter from Lee R. Marks to Abner W. Sibal. I have discussed portions of the Kissinger cable omitted by the majority, and find that the entire cable offers overwhelming support to the view that the nationality of a corporation is to be determined

by the place of incorporation. The Marks-Sibal letter is only one of a pair of letters from State Department deputy legal advisors, written about one year apart, that take directly opposite views on the question before us. The letter that supports my view of articles XXII(3) and VIII(1) is dated September 11, 1979, and is from State Department Deputy Legal Advisor James R. Atwood to Lutz Alexander Prager, Assistant General Counsel of the EEOC. The majority quotes the Atwood-Prager letter in their footnote 3, but dismisses the letter as an "aberration" in State Department policy. After a full reading of the Bassin Memorandum and the Acheson and Kissinger dispatches, it seems apparent that the Marks-Sibal letter is, in fact, the aberration. But I find both letters to be entirely conclusory and largely insignificant in light of the clear position taken in the Acheson and Kissinger dispatches.

To summarize, the majority rejects the plain meaning of article XXII(3) even though their reading creates major problems in the internal structure and consistency of the Treaty. Their authorities for this reading are four secondary sources, two of which (the Kissinger dispatch and Herman Walker articles) clearly support the plain meaning of article XXII(3), one of which (the Bassin Memorandum) is inconclusive, and one of which (the Marks-Sibal letter) is offset by an equal or superior interpretation to the contrary (the Atwood-Prager letter). The majority ignores the Acheson dispatch, the most authoritative secondary source available to us. In contrast, if we simply follow the clear test set out in article XXII(3) and hold that a company incorporated under United States law is a "company of the United States," the Treaty is a precise and cohesive document. This reading of article XXII(3) is supported by consistent, explicit, and authoritative interpretations by the State Department dating back to the height of the Treaty negotiations in 1952. I would hold that C. Itoh-America is not a company of Japan but a company of the United States and is, therefore, not within the terms of article VIII(1).

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No. 80-2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

—v.—

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Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Sumitomo Shoji America, Inc. ("Sumitomo") has asked this Court to consider the question of whether the right provided by Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 (1953) (the "Treaty"), to fill management level positions with Japanese nationals, is limited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Three recent United States District Court decisions support Sumitomo's contention that its petition raises an important question warranting the grant of certiorari by this Court.

In an unreported decision dated September 9, 1981, the United States District Court for the Northern District of Illinois, in *Porto v. Canon, U.S.A., Inc.* (No. 81 C 1305)

(Decker, J.), denied a motion made by the defendant, a United States subsidiary of a Japanese corporation, to the extent it relied on the employment provision of Article VIII(1) of the Treaty in requesting an order dismissing plaintiff's Title VII claim. App. A, *infra*, 1a-12a. That District Court expressly rejected the decision of the Second Circuit below, and the majority decision of the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981), *reh. en banc granted* (Aug. 7, 1981), and instead relied wholesale on the dissenting opinion in *Spiess*, *supra*, which argued that a U.S. subsidiary of a Japanese investor cannot invoke the Treaty's employment provision. It also indicated, however, that the authority of *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973), would require dismissal of plaintiff's Title VII claim if it is shown that the "defendant is discriminating only in favor of Japanese *citizens*, and not in favor of persons of Japanese national origin . . . . " *Porto*, App. A, *infra*, at 11a, n.3.

In a second unreported decision, dated October 1, 1981, the United States District Court for the Northern District of Illinois, in *Mattison v. Canon U.S.A., Inc.* (No. 81 C 1304) (McMillan, J.), also expressly rejected the decisions of the Second and Fifth Circuits and concurred with the dissent in *Spiess*, *supra*, holding that a United States subsidiary of a Japanese corporation is not within the coverage of Article VIII(1) of the Treaty. App. B, *infra*, 13a-16a. However, unlike the decision in *Porto*, *supra*, the *Mattison* decision fails to recognize that the authority of *Espinoza*, *supra*, might warrant dismissal of that action.

In a third unreported decision, dated October 2, 1981, the United States District Court for the Eastern District of New York, in *Linskey v. Heidelberg Eastern, Inc.* (No. 77 C 833) (Costantino, J.), denied for the second time the defendants' motion for summary judgment or dismissal made in reliance on an employment provision in the Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of Denmark, 12 U.S.T. 908 (1961), comparable to

Article VIII(1) of the Treaty with Japan.* App., C, *infra*, 17a-23a. That District Court predicated its analysis on the premise that "in the absence of legislative history demonstrating that Title VII was not intended to override the provisions of The Danish Treaty, this court must abide by its prior decision and the authority of *Avigliano*." App. C, *infra*, at 22a. The District Court in *Linskey* also assumed that Title VII is an equal protection statute, *id.*, and ignored the teaching of this Court in *Espinoza*, *supra*, that ". . . nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage." 414 U.S. at 95.

The District Courts in *Porto*, *Mattison* and *Linskey* erred in failing to give full recognition to international treaty obligations of the United States. Those decisions illustrate the wide divergence of views among United States courts which have considered the question raised in Sumitomo's petition and thus further support Sumitomo's contention that this case justifies the grant of certiorari by this Court.

Respectfully submitted,

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October 23, 1981

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* The District Court's first decision in *Linskey* is reported at 470 F. Supp. 1181 (E.D.N.Y. 1979) and is referred to in Sumitomo's petition at 9, n. 6.

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 1305

WILLIAM L. PORTO,

Plaintiff,

—vs.—

CANON, U.S.A., INC.,

Defendant.

MEMORANDUM OPINION AND ORDER

Plaintiff, William L. Porto, filed this action against defendant, Canon, U.S.A., Inc., alleging violations of Title VII, 42 U.S.C. § 2000e, and 42 U.S.C. § 1981. Specifically, plaintiff alleges that defendant has established a hiring, promotional and employment system which limits the employment and promotional opportunities of non-Japanese national origin employees. Moreover, plaintiff alleges that if he were of Japanese national origin, he would not have been fired. Currently pending is defendant's motion to dismiss.

Plaintiff objects to the motion to dismiss because defendant filed the motion after it had filed an answer to the complaint. Rule 12(b) provides that a motion to dismiss "shall be made before pleading if a further pleading is permitted." Thus,

courts have noted that motions to dismiss for failure to state a cause of action upon which relief can be granted should be made prior to service of a responsive pleading. *See, e.g., Bowen v. Pan American World Airways, Inc.*, 474 F.Supp. 563 (S.D.N.Y. 1979); *United States v. City of Philadelphia*, 482 F.Supp. 1274 (E.D.Pa. 1979), *aff'd*, 644 F.2d 187 (3d Cir. 1980). However, both these cases recognize that the substance of a motion to dismiss may be considered after the pleadings are closed as a motion for judgment on the pleadings under Rule 12(c).

Moreover, the purpose of requiring a motion under 12(b) to be filed before service of a responsive pleading is to determine the sufficiency of the complaint before requiring the parties to undergo the expense of discovery and further litigation. There is no reason for this court to allow discovery and trial to proceed, only to hold, after a trial on the merits, that the complaint fails to state a cause of action as a matter of law. Thus, whether the court considers the motion under 12(b) or (c), the court still must reach the substance of defendant's arguments.

Defendant's substantive argument is a most unique one. Defendant argues that Title VII is not applicable because it has been superseded by the Treaty of Friendship, Commerce and Navigation between the United States and Japan. Defendant also argues that plaintiff's complaint does not state a cause of action under § 1981 because that section does not apply to discrimination based on national origin. Each argument is considered in turn.

The treaty, entered into on April 2, 1953, provides in Article VIII(1):

> "Companies of either Party shall be permitted to engage, within the territory of the other Party accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*." (Emphasis supplied.)

Defendant contends that this provision allows it to discriminate in favor of Japanese nationals for executive and technical

positions. The Fifth Circuit has accepted defendant's arguments despite the blistering and well-reasoned dissent of Judge Reavley. *Spiess v. C. Itoh & Company, Inc.*, 643 F.2d 353 (5th Cir. 1981). The Second Circuit has held to the contrary. *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981).

Defendant's argument presents two questions. Since defendant is a subsidiary, organized in the United States, of a parent Japanese corporation, the first question is whether an American subsidiary of a Japanese corporation is a Japanese company for the purposes of the treaty. Assuming that defendant is a Japanese company within the meaning of the treaty and entitled to invoke the Article VIII rights, the second inquiry is whether this article gives defendant a limited right to discriminate in favor of Japanese nationals. For the reasons stated below, the court concludes that defendant is not a Japanese company for treaty purposes and that even if it were, Article VIII(1) does not exempt it from Title VII.

Article XXII(3) of the Treaty provides:

> "[*C*]*ompanies constituted under the applicable laws* and regulations within the territories of either Party *shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party." (Emphasis supplied.)

The clear language of this article suggests that a "company of Japan" is only an entity constituted under the applicable laws of that country and consequently a company for purposes of the treaty should be determined by its place of incorporation. Since defendant is incorporated under the laws of the United States and not Japan, the clear language of the treaty dictates that defendant "shall be deemed [a] compan[y]" of the United States.

Despite this clear language, two courts of appeals have concluded that an American subsidiary owned by a Japanese corporation is a Japanese company within the meaning of the treaty. *Spiess*, *supra*; *Avigliano*, *supra*. Both the Second and Fifth Circuits admitted that they were departing from a literal

reading of the treaty, but justified this departure on three major grounds: (1) the purpose and history of the treaty mandate the conclusion that Article XXII(3) merely guarantees legal recognition to diverse forms of legal entities and does not determine which of those entities can assert treaty rights; (2) to read the treaty literally would exhalt form over substance; and (3) to read the treaty literally would result in a "crazy-quilt pattern" of rights for subsidiaries.

For the reasons stated in *United States v. R.P. Oldham Co.*, 152 F.Supp. 818, 823 (N.D.Cal. 1957), and Judge Reavley's dissent, this court finds the Second and Fifth Circuit's analysis unpersuasive. The court, for the reasons stated by Judge Reavley, concludes that Article XXII(3) does not allow American subsidiaries to invoke the rights of Article VIII(1).

The Japanese treaty is one in a long line of Friendship, Commerce and Navigation treaties (FCN) negotiated on a bilateral basis between the United States and other countries. The purpose of these treaties is to create a medium through which two nations provide "for the rights of each country's citizens, their property and other interests, in the territories of the other, and for the rules mutually to govern their trade and shipping." Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am.J.Comp.L. 229, 230-31 (1956); *see, generally*, Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn.L.Rev. 805 (1958). The FCN treaties, including the Japanese treaty, are self-executing treaties. Such treaties are the supreme law of the land and supersede inconsistent state law. Federal statutes should not be construed to violate the treaty if any other possible construction remains and only when Congress clearly intends to depart from the obligations of a treaty will inconsistent federal legislation govern. *Spiess, supra.*

In interpreting Article XXII not to determine which forms of corporate organization were entitled to assert treaty rights, but only to ensure that unfamiliar organizations would be recognized as companies by the legal institutions of the respective countries, the Fifth Circuit relied on several State Depart-

ment memoranda and several articles written by Herman Walker, an FCN authority.[1]

Judge Reavley thoroughly discussed the materials relied on by the majority in *Spiess*. For the same reasons that he found them unpersuasive, this court also finds them unpersuasive. The court need not repeat that discussion here. *Spiess*, 643 F.2d at 371-72.

Moreover, Judge Reavley also found affirmative support for his view in the history of the treaty. One such document is a dispatch sent from the Secretary of State Acheson to the Treaty negotiators. The dispatch apparently concerned the meaning of Article XXI(e). It provides:

> "The analysis of this question begins with the second sentence of Article XXII, Paragraph 3, which establishes that whether or not a juridical entity is a *'company' of either Party, for treaty purposes, is determined solely by the place of incorporation*. Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded." (Emphasis supplied.)

Judge Reavley also noted that the view taken by Acheson that a company for treaty purposes is determined solely by the place of incorporation is confirmed by a State Department dispatch from Secretary of State Kissinger. In this dispatch, Kissinger clearly states that a "company's status and nationality are determined by place of establishment." This court agrees with Judge Reavley that these secondary sources confirm a literal reading of the treaty and undermines the Fifth Circuit's conclusion that the history of the treaty justifies a departure from that literal reading.

Even if this court accepted the Fifth and Second Circuits' conclusion that the treaty merely guarantees legal recognition

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1 The Second Circuit relied on the history of the negotiations preceding the ratification of a similar treaty between the United States and the Netherlands. While not irrelevant to the question before the court, this court finds the history of the treaty with Japan more probative of the question of the purpose of the treaty than the materials relied on by the Second Circuit.

to diverse forms of legal entities and does not determine which of those entities can assert treaty rights, the court would still have to determine whether an American subsidiary of a parent Japanese corporation is a Japanese company or an American company. That is, if Article XXII does not define a corporation's nationality for purposes of the treaty, how does international law determine the nationality of a corporation? International law is clear that an international corporation has the nationality of its place of incorporation. *Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain)*, 1970 I.C.J. Rep. 3, 42 (International Court of Justice) H. Walker, *Companies*, ch. VII in R.R. Wilson, *United States Commercial Treaties and International Law* 182, 193 (1960). Thus, under international law, since defendant is incorporated under the laws of the United States, for purposes of the treaty, it would be an American company and not a Japanese company. In sum, the clear language of the treaty, the history of the treaty and the settled principles of international law all establish that an American subsidiary of a Japanese company is an American company for treaty purposes.

The Second Circuit also argued that "to hold that [a] Japanese business enterprise forfeits its rights under the Treaty merely because it chooses to function through a wholly-owned locally-incorporated subsidiary would in our view disregard substance for form." *Avigliano*, 638 F.2d at 556. This court disagrees with this conclusion for two reasons. First, as Judge Reavley points out in his dissent, wholly owned subsidiaries of Japanese corporations are specifically given several rights under the treaty. Indeed, the only "right" of major practical importance that depends on the company's place of incorporation is the one given in Article VIII(1). Second, whether a company chooses to operate as a wholly owned subsidiary or a branch of an existing corporation is not an inconsequential decision, as the Second Circuit suggests. The choice will have many legal consequences. For example, service of process on a subsidiary usually does not constitute effective service on the parent. As well, when a corporation decides to form a subsidi-

ary, it considers the tax and conflict of laws consequences of its decisions. If a corporation decides to organize under American law in order to invoke these benefits, it does not seem unfair to require it to accept the burdens of American law. Consequently, this court cannot agree that its interpretation of the treaty disregards substance for form.

Finally, both the Second and Fifth Circuits argued that interpretation of Article XXII(3) as to subsidiaries would create a "crazy-quilt pattern" in which branches of Japanese corporations would enjoy broad rights under the treaty while subsidiaries would be entitled only to minor protection. Under a literal reading of the treaty, a company is considered a "company of Japan" only if it is incorporated in Japan. Consequently, American incorporated subsidiaries of Japanese corporations are only entitled to treaty protection when they are specifically mentioned. Both the Second Circuit and Fifth Circuit argue that "[i]t is illogical to infer that the drafters of the Treaty intended to make such a dramatic distinction between forms of business operation." *Avigliano*, 638 F.2d at 556. Once again, for the reasons stated by Judge Reavley, this court must disagree with the conclusion of the Fifth and Second Circuits.

The most important reason why this court disagrees with the argument of the Fifth and Second Circuits is that it defies the plain meaning of Article XXII(3). The court agrees with both the Fifth and Second Circuits that one of the purposes of this article is to determine when the juridical entity designated as a "company" exists. But, if this is the only purpose of the clause, the existence of the phrase "shall be deemed companies thereof" is rendered superfluous. As Judge Reavley asked, "What is the meaning of this phrase if not to determine corporate nationality for the purposes of the Treaty?" *Spiess*, 643 F.2d at 364.

An analysis of the treaty structure and articles supports a literal reading of Article XXII(3), despite the Second and Fifth Circuits' arguments to the contrary.

First, the treaty consistently uses three terms of art to allocate benefits among private parties: "nationals," "compa-

nies" and "enterprises controlled by such nationals or companies." The fact that the framers used three separate terms indicates that each term was to represent a distinct entity. But under the Fifth and Second Circuits' views, there would be no reason to use the term "enterprises controlled by such nationals or companies" since that entity is already a "company" or a "national." Thus, that view renders the last term meaningless and creates additional confusion and redundancy. This court's analysis, on the other hand, gives each term a distinct meaning and eliminates any confusion or redundancy.

Second, two articles of the treaty are clearly based on the assumption that a company has the nationality of its place of incorporation. The first sentence of Article VII(1) provides that nationals and companies of Japan are entitled to equality of treatment with nationals and companies of the United States. The second sentence, however, confers a narrower right on Japanese controlled American companies—the right of equality of treatment with subsidiary enterprises controlled by nationals and companies of the United States. This distinction, of course, only makes sense, if a Japanese controlled American subsidiary is considered a company of the United States. If this entity is a company of Japan, it would already be entitled to national treatment, and the grant of the narrower right would be meaningless.

Article XXI(1)(e) of the treaty also indicates that the nationality of the corporation is to be determined by its place of incorporation. Judge Reavley's dissent makes this point persuasively, and his discussion need not be repeated here. *Spiess*, 643 F.2d at 366.

Third, under normal principles of statutory interpretation, if an item is specifically enumerated in one section of a statute but omitted from a similar enumeration in a closely related section, the exclusion is held to be intentional and meaningful unless plain reason or authoritative sources indicate otherwise. Articles VII(1), VII(4), XVI(2), VI(3) (read in conjunction with paragraph 2 of the protocol) and VI(4) grant express rights to nationals and companies of either party operating in the territory of the other party and then specifically extend the

same or similar rights to "enterprises controlled by such nationals or companies." Other adjacent articles, however, extend rights only to nationals and companies of either party and make no mention of controlled enterprises. The Fifth and Second Circuits conclude that such distinctions are haphazard. This court, applying accepted principles of statutory construction, cannot agree. The history of the treaty shows that it was drafted with great care and thought. The court must conclude that the drafters meant what they wrote and that the exclusion of the phrase "enterpises controlled by such nationals or companies" was intentional. Thus, the court must also conclude that the exclusion of the phrase, "enterprises controlled by such nationals or companies" from Article VIII(1) is intentional.

Moreover, the specific inclusion of the phrase "enterprises controlled by such nationals or companies" would be completely redundant if such enterprises were already companies. This is particularly true since in other articles the treaty also grants the same rights to "companies" that these five articles grant to enterprises controlled by such nationals. This court's construction of these two phrases eliminates the redundancy since each phrase is given a distinct meaning.

Furthermore, as Judge Reavley has noted, the "crazy-quilt pattern" of which the Fifth and Second Circuits complain does not emerge in as a dramatic form as one might think. While it is true that some 20 articles of the treaty do not use the phrase, "enterprises controlled by such nationals or companies," this court agrees with Judge Reavley that "the distinctions make little practical difference." *Spiess*, 643 F.2d at 369.[2]

Finally, these distinctions are not necessarily arbitrary as the Second and Fifth Circuits suggest. It makes perfect sense that the drafters of the treaty would want to confer a more complete set of rights on companies that are incorporated in Japan than they would for American subsidiaries that are owned by Japanese companies or nationals. For all of these

2 Judge Reavley has explained in his dissent why the distinctions do not have any great practical importance and his discussion need not be repeated here.

reasons, the court concludes that defendant is an American company for purposes of the treaty.

Even assuming, however, that defendant is a company of Japan for purposes of the treaty, it is less than clear that the phrase "of their choice" exempts the defendant from the mandates of Title VII.

Again, both the Fifth and Second Circuits have considered this question. The Fifth Circuit has concluded that the treaty does exempt American subsidiaries of Japanese parents from Title VII, *Spiess, supra*, while the Second Circuit has reached the opposite conclusion. *Avigliano, supra. Accord, Linsky v. Heidelberg Eastern, Inc.*, 470 F.Supp. 1181 (E.D.N.Y. 1974).

This court finds itself in agreement with the Second Circuit on this issue. At the time the treaty was negotiated, a number of American states and many foreign countries severely restricted the employment of noncitizens within their boundaries. *Avigliano, supra*; Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan.L.Rev. 947 (1979). Article VIII of the treaty, which allows companies of either party to hire executive personnel "of their choice" when operating in the other party's land, was intended to exempt companies from these state restrictions on the employment of noncitizens. *Avigliano*, 638 F.2d at 559.

While it appears that Article VIII was intended to facilitate a party's employment of its own nationals, there is no evidence to support the broad interpretation which defendant urges. Defendant's argument, taken to its logical conclusion, would not only mean that defendant is exempt from Title VII, but from laws granting rights to unions and employees, Labor Management Relations Act, 29 U.S.C. §§ 141-187, and the like, and even possibly from laws prohibiting employment of children, § 12 of the Fair Labor Standards Act, 29 U.S.C. § 212. It also seems implausible that the treaty was intended to exempt defendant from Title VII since Title VII was passed after the treaty was ratified.

In view of these facts, the court concludes that subjecting a Japanese company to the mandates of Title VII is consistent with both the language and purpose of the treaty. This is

particularly true since Title VII does not preclude defendant from employing Japanese nationals in positions where such employment is reasonably necessary to the successful operation of its business. *Avigliano, supra*; 42 U.S.C. § 2000e-2(e). (The bona fide occupation qualification (BFOQ).) The Second Circuit has also noted that although the "BFOQ" is usually construed narrowly, in this situation, the "BFOQ" defense "must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company doing business in the United States." *Avigliano*, 638 F.2d at 559.[3]

For this second and independent reason, the court concludes that the treaty cannot form a basis upon which to dismiss the complaint.

This leaves for discussion plaintiff's claim under 42 U.S.C. § 1981. It is defendant's theory that 1981 does not prohibit discrimination on the basis of national origin. Plaintiff's response is two-fold: (1) § 1981 does prohibit discrimination on the basis of national origin; and (2) even if it does not, the complaint also alleges discrimination on the basis of race. Each of plaintiff's contentions is considered in turn.

The law is well settled in this district that in order for a plaintiff to predicate an action on this section, he must allege

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3 Although the complaint states that defendant is discriminating on the basis of national origin, the complaint also complains that defendant is discriminating in favor of Japanese *citizens*. While Title VII clearly forbids discrimination on the basis of national origin, it does not prohibit discrimination on the basis of citizenship. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973). *See*, Note, *Treaties and Civil Rights Law, supra*. Thus, if defendant is illegally discriminating in favor of persons of Japanese national origin who are not Japanese citizens, a cause of action under Title VII may be stated. However, if defendant is discriminating only in favor of Japanese *citizens*, and not in favor of persons of Japanese national origin, it is doubtful that a cause of action is stated under Title VII. *Espinoza, supra*. Since neither party has raised this issue in their briefs, and the success of this argument may depend on a question of fact, the court declines to base its ruling on *Espinoza*, at this time. The court will, of course, entertain a motion to dismiss or for summary judgment on this theory if it does appear that defendant is only allegedly discriminating on the basis of citizenship.

discrimination on the basis of race. The section does not pertain to discrimination on the grounds of national origin. *Abshire v. Chicago and Eastern Illinois Railroad Co.*, 352 F.Supp. 601, 602 (N.D.Ill. 1972) (Judge Bauer); *Vasquez v. Werner Continental, Inc.*, 429 F.Supp. 513, 515 (N.D.Ill. 1977) (Judge Crowley); *Plummer v. Chicago Journeyman Plumbers*, 452 F.Supp. 1127 (N.D.Ill. 1978); *see, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968). Consequently, the court concludes that § 1981 does not prohibit discrimination on the basis of national origin.

Although plaintiff in a few paragraphs of its complaint alleges that he is being discriminated against because of his race, the *facts* alleged do not support this conclusion. The plaintiff is not complaining that he is discriminated against because he is white. Rather, the complaint clearly alleges that plaintiff is being discriminated against because he is not of Japanese origin. There is nothing in the complaint to indicate that plaintiff is treated any differently than blacks, hispanics, American Indians or orientals. The only facts alleged indicate that defendant is giving preference to persons of Japanese national origin over all other persons. Consequently, the complaint focuses on national origin as the basis for the discrimination and does not state a claim for discrimination on the basis of race. Consequently, plaintiff's § 1981 claim must be dismissed.

For the reasons stated above, defendant's motion to dismiss is granted in part and denied in part; defendant's motion to dismiss plaintiff's claim under Title VII is denied; defendant's motion to dismiss plaintiff's claim under 42 U.S.C. § 1981 is granted, and the § 1981 claim is hereby ordered dismissed.

ENTER:

/s/ Bernard M. Decker

United States District Judge

DATED: September 9, 1981

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 1304

EDWARD L. MATTISON,

Plaintiff,

—v.—

CANON U.S.A., INC.,

Defendant.

DECISION ON DEFENDANT'S MOTION TO DISMISS

Defendant, after filing an answer to the complaint, filed a motion to dismiss pursuant to F.R.C.P. 12(b)(6) for failure to state a claim. The motion is supported by certain official documents and is opposed by an affidavit of the plaintiff. Therefore it can be considered as a motion for summary judgment, particularly since the motion raises important substantive issues which must be decided before we reach the merits.

The complaint alleges discrimination against the plaintiff on the basis of race, color and national origin. One of the jurisdictional bases alleged is the Fourteenth Amendment to the Constitution of the United States. This amendment does not reach claims of discrimination against private corporations. Therefore, this allegation of jurisdiction in paragraphs 1 and 15 are of no legal significance and should be stricken. *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).

Plaintiff also alleges jurisdiction under the Civil Rights Act of 1866, 42 U.S.C. § 1981. This section applies to discrimination on the basis of race but not on the basis of national origin. *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975). Plaintiff alleges discrimination against himself, a white person, and in favor of "Japanese" persons on the basis of "national origin or race" (pars. 13 and 15). Whether plaintiff can prove a claim of discrimination based upon "race" remains an issue of fact, perhaps one subject to expert testimony. In any event, the allegation of jurisdiction based on § 1981 is proper.

The third alleged basis for jurisdiction is Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), which proscribes discrimination on the basis of either race or national origin. Defendant contends, however, that the pre-existing Treaty of Friendship, Commerce and Navigation between the United States and Japan dated April 2, 1953 gives it a right to favor Japanese Nationals and takes precedence over Title VII.

Article VIII(1) of that Treaty provides:

> Companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

Plaintiff alleges that by the time of his termination of employment on July 25, 1980 he held the position of Order Department Manager. Whether or not this constituted him an "executive personnel. . .[or] other specialists" within the meaning of the foregoing clause is another question of fact which cannot be decided on a motion to dismiss. We believe we can, however, decide whether or not the defendant is a "Company of either Party."

Defendant Canon is allegedly a wholly-owned subsidiary of Canon, Inc. Japan, a Japanese corporation. Plaintiff also alleges that defendant itself is a "Japanese" corporation with its principal place of business in Illinois (par. 6 of the complaint). However, the parties argue in their memoranda that defendant is incorporated under the laws of the United States.

Assuming this to be the fact, then the defendant is not within the coverage of Article VIII(1) of the Treaty. Article XXII(3) provides:

> Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

The foregoing language seems clear enough to us to mean that when a citizen (or corporation) of Japan creates a corporation in the United States for the purpose of doing business here, it then remains a corporation constituted under the laws and regulations of the United States. The fact that it is owned or controlled by persons who are not citizens of the United States is irrelevant under the above definition, and the United States subsidiary is therefore subject to Title VII which was adopted by Congress after the Treaty, and to § 1981 which was in existence before the Treaty was adopted.

In this we concur with the dissent of Judge Reavley in *Spiess* v. *Itoh & Co.*, 643 F.2d 353 (5th Cir. 1981) and disagree with the majority decision in that case and the decision in *Avigliano* v. *Sumitomo Shoji America*, 638 F.2d 552 (2d Cir. 1981).

Our foregoing difference of opinion with the Second and Fifth Circuit Courts of Appeals is of course of no significance if plaintiff was not the type of employee covered by Article VIII(1) or if he cannot prove a *prima facie* case of discriminatory discharge. Furthermore, the Second Circuit at least has ruled that the language of Article VIII(1) does not give any employer, domestic or otherwise, a blanket exemption from Title VII merely because it can employ certain persons "of their choice."

The Civil Rights Act of 1964 is a basic part of the legal fabric of our Nation and was passed by both branches of Congress. The statute grants an exemption for hiring on the basis of national origin when "reasonably necessary to the normal operation of that. . .business" (42 U.S.C. § 2000e 2(e)). We must assume that Congress either believed the two

documents were thereby made consistent or it intended to amend the favored nationality provision of Article VIII(1) of the Treaty. We prefer to adopt the former alternative, but even if this is unrealistic, treaties are not graven in stone in perpetuity and regardless of the historical developments which have occurred since 1953.

In any event, defendant's motion to dismiss, filed May 20, 1981, is denied, with the exception that it is granted as to the allegations of violation of the Fourteenth Amendment to the Constitution of the United States.

This case will be called for a report on status on Tuesday, October 13, 1981 at 11:00 a.m. for the purpose of setting a time for completion of all discovery and for trial.

ENTER:

/s/ Thomas R. McMillan

JUDGE, U.S. DISTRICT COURT

DATED: Oct. 1, 1981

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. 77 C 833

JAMES M. LINSKEY,

Plaintiff,

—against—

HEIDELBERG EASTERN, INC., THE EAST ASIATIC COMPANY, INC., THE EAST ASIATIC COMPANY, LTD.,

Defendants.

MEMORANDUM OF DECISION AND ORDER

COSTANTINO, D.J.

This is a motion by the defendants for summary judgment and/or dismissal of the complaint. The issue in this motion concerning the defendants' liability under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, was previously before this court and the court denied defendants' motion. *See Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1180 (E.D. N.Y. 1979). Defendants now maintain that that recent appellate case law in the Second Circuit, *see Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), and in the Fifth Circuit, *see Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981), suggests that this court's previous decision was improper, and that the court should now grant defendants' motion. The court has reviewed

the documents and case law submitted by defendants in support of their position, and concludes that its previous decision was correct, and should not be disturbed. Thus, for reasons set forth below, the motion is denied.

The facts and parties in this action are well known to the court. Briefly, plaintiff, James Linskey ("Linskey"), was an employee of Heidelberg Eastern, Incorporated ("Heidelberg") for 14 years before his discharge on October 31, 1975. Heidelberg is a subsidiary of the East Asiatic Company, Incorporated ("EAC, American"). EAC, American is a subsidiary of East Asiatic Company, Limited ("EAC, Denmark"). Both Heidelberg and EAC, American are domestic corporations doing business in New York. EAC, Denmark is a foreign corporation incorporated under the laws of Denmark.

In 1961, Heidelberg hired Linskey as an Assistant Treasurer. By 1975, Linskey, then 55 years of age, had advanced to become the Treasurer of Heidelberg. As treasurer, Linskey was the second highest ranking officer in Heidelberg and was responsible for fiscal affairs. His two claims for relief charge Heidelberg, EAC, American and EAC, Denmark with discharging him because he was an older American citizen, and not a Danish citizen. He bases his first claim on an assertion of national origin discrimination in violation of Title VII and his second claim on a violation of the age discrimination provisions of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.*

The defendants maintain, herein, that their actions, as a Danish corporation and its American subsidiaries, are exempt from the mandates of Title VII because of certain provisions in the Treaty of Friendship, Commerce and Navigation ("FCN") with Protocol between the United States of America and the Kingdom of Denmark, (1951), 12 U.S.T. 908, T.I.S. 4797, 421 U.N.T.S. 105 ("The Danish Treaty").[1] Specifically, the defen-

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1 When The Danish Treaty defense was first before this court, the only defendant who asserted the defense was EAC, Denmark. The Second Circuit, however, in *Avigliano v. Sumitomo Shoji America, Inc., supra*, permitted Japanese subsidiaries incorporated in the United States to invoke FCN treaty provisions to the same extent as native

dants rely on Article VII, § 4 of The Danish Treaty which provides as follows:

> Nationals and companies of either party shall be permitted to engage, within the territories of the other Party, accountants . . . other technical experts, and executive personnel . . . of their choice, *regardless of nationality*. (emphasis supplied)

It is defendants' position that this provision permits Danish companies under prescribed circumstances to discriminate in favor of Danish nationals. Thus, defendants argue that, since Linskey's office as Treasurer fell within the definition of "executive personnel" in Article VII, § 4, they had the right to dismiss and select this officer without regard to the mandates of Title VII.

In support, defendants cite the Second Circuit's decision in *Avigliano v. Sumitomo Shoji America, Inc.*, *supra*, and the Fifth Circuit's decision in *Spiess v. C. Itoh & Co. (America), Inc.*, *supra*. In *Avigliano*, female employees filed suit against the defendant alleging sexual and national origin discrimination under Title VII for defendants' practice of hiring only male Japanese nationals for management level positions. As in this case, the defendant asserted that its acts were exempt from Title VII because of certain provisions in the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 ("The Japanese Treaty"). Specifically, the defendant cited Article VIII of The Japanese Treaty which provides as follows:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*. (emphasis supplied)

Japanese corporations operating in the United States. On the basis of *Avigliano*, the defendants herein have moved for summary judgment and/or dismissal on behalf of all three defendants including the Danish subsidiaries, Heidelberg and EAC, America.

In its decision, the *Avigliano* court acknowledged the applicability of the "of their choice" language, but refused to allow the defendant to use this language as the basis for an executive personnel exception from the nationality discrimination restrictions in Title VII. The *Avigliano* court reasoned that the purpose of the "of their choice" language provision was to give citizens of foreign countries, in that case Japan, the same status as citizens of the host country, not to afford the foreign company the option of discriminatory in favor of its nationals when hiring and discharging employees. *Id.* at 559. As the Second Circuit noted

> Although the clause "of their choice" was . . . intended, in furtherance of the overall purpose of the Treaty, to facilitate a party's employment of its own nationals to the extent necessary to insure its operational success in the host country, no evidence supports Sumitomo's broad interpretation which carried to its logical conclusion, would immunize a party not only from Title VII but also, from laws prohibiting employment of children, § 12 of the Fair Labor Standards Act, 29 U.S.C. § 212, laws granting rights to unions and employees, Labor Management Relations Act, 29 U.S.C. §§ 141-87, and the like. *Id.* at 559.

As opposed to allowing a loop-hole to be made in the dictates of Title VII, the *Avigliano* court concluded that subjecting the defendant to the "bona fide occupational qualification" ("bfoq") exception in Title VII, *see* section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), and forcing the defendant to show that national origin is a necessary qualification for the position in question would "not . . . impose undue burden on foreign employees." *Avigliano v. Sumitomo Shoji America, Inc., supra*, 638 F.2d at 559.[2]

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2 Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), expressly provides that "it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . national origin in those certain instances where . . . national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

In a contrary ruling, the Fifth Circuit, in *Spiess v. C. Itoh & Co. (America), Inc., supra*, when faced with the identical provision in The Japanese Treaty and with allegations of discrimination under Title VII, rejected the *Avigliano* court's ruling making the following observation:

> Considering the Treaty as a whole, the only reasonable interpretation is that article VIII(1) means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country laws. *Id.* at 361.

The Fifth Circuit has thus split the circuits and has elevated the "of their choice" language to a point where foreign companies whose native countries are parties to FCN treaties with similar provisions may openly discriminate on the basis of nationality, and give additional consideration to their national employees in this country. Specifically, the *Spiess* court held that " [t]o make this right subject to Title VII's bfoq requirements . . . would render its inclusion in the [Japanese] Treaty meaningless. Thus, we hold that the article VIII(1) 'of their choice' provision permits Japanese companies to discriminate in favor of their fellow citizens." *Id.* at 362.

With this background, defendants argue that, unlike the broad "of their choice" provision in The Japanese Treaty, the more narrow regardless of nationality" provision in The Danish Treaty carves out a limited exception for nationality, and that consequently, they do not have to meet the bfoq exception of Title VII to avoid potential liability. Moreover, defendants assert that the *Avigliano* court's interpretation of the "of their choice" provision in The Japanese Treaty does not mandate a contrary result because, unlike the instant case, the "of their choice" language threatened to open the door to numerous exceptions to Title VII, whereas the "regardless of nationality" language in The Danish Treaty offered merely a limited exemption for nationals.

This argument, however, fails to consider that when faced with the rather broad "of their choice" language, the *Avigliano* court specifically focused on how the "nationality"

aspect of this phrase would conflict with Title VII. As a practical matter, the *Avigliano* court treated the "of their choice" language as synonomous with the "regardless of nationality" language, and it still refused to carve out an exception from Title VII for nationals. This argument by the defendants seeks to create a distinction, when in fact, none exists.

In reality, defendants are asking this court to reject the Second Circuit's holding in *Avigliano* and adopt the Fifth Circuit's holding in *Spiess*. This court does concede that the Fifth Circuit's rationale is quite compelling as there is a strong argument for the theory that American businessmen like foreign businessmen sought provisions such as those contained in the Danish and Japanese Treaties "to ensure that the . . . businessman's investment in the host country would remain within his control." *Spiess v. C. Itoh & Co. (America), Inc.*, *supra*, 643 F.2d at 361. However, in the absence of legislative history demonstrating that Title VII was not intended to override the provisions of The Danish Treaty, this court must abide by its prior decision and the authority of *Avigliano*.

The court agrees with the defendants that fears expressed by the *Avigliano* court regarding exemption from child labor laws and laws concerning union relations, *see Avigliano v. Sumitomo Shoji America, Inc.*, *supra*, 638 F.2d at 559, which could result by exempting signatories to FCN treaties from the prescriptions of Title VII do not pertain to the instant action. There is, nonetheless, a firm commitment to uphold and support the progress of Title VII in its attempt to wipe out all forms of invideous discrimination, and this court perceives no compelling reason to put a chink in that armor. This court does not think it unduely burdensome to compel a party discriminating on the basis of nationality to meet the bfoq exception of Title VII to avoid potential liability. Such a procedure will afford the discriminating employer the opportunity to justify its actions while also safeguarding those rights that Title VII seeks to protect. Accordingly, the motion is denied.

The defendants also argue that even assuming plaintiff's Title VII claim, the claim fails on the merits because plaintiff was replaced by an American citizen, and thus, there was no nationality discrimination. *Citing Hudson v. International Business Machines*, 602 F.2d 351 (2d Cir. 1980), *cert. denied*, 101 S.Ct. 794 (1981). In rebuttal, plaintiff responds by contending that, while it may be that an American replaced him as Treasurer, plaintiff's actual duties were taken over by several Danish employees. The court will not dismiss plaintiff's claim at this point on the basis of defendants' broad allegations. There will come a time when plaintiff will be put to his proof, and at such time, a decision will be made regarding who took over what tasks, and whether such a division of responsibilities transpired after plaintiff's dismissal. At this time, however, proper facts are not before the court to make a final determination.

Finally, even if the court were to dismiss plaintiff's claim of nationality discrimination, the court would still be compelled to deny the motion to dismiss because there still remains the age discrimination question under the ADEA. The defendants never addressed this issue, and as far as the court is concerned, it continues to be an issue before the court.

Accordingly, defendants' motion is denied in all respects. The next conference in the matter is scheduled for October 23, 1981.

So Ordered.

/s/ Mark A. Costantino

United States District Judge

FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 80-2070 and 81-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2070

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents.

No. 81-24

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Cross-Petitioners,

—v.—

SUMITOMO SHOJI AMERICA, INC.,

Cross-Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(Attorneys listed inside front cover)

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NOTE

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Relevant Docket Entries

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, *et al.*,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

DATE	FILINGS—PROCEEDINGS
11-21-77	Filed complaint. Issued summons.
2-21-78	Filed deft's objections to pltffs' interrogatories.
2-21-78	Filed deft's answers to pltffs' interrogatories.
5-18-78	Filed deft's Notice of Motion for an order pur. to Rule 12(b)(6) dismissing the class action claims for failure to state a claim and for an order pur. to 12(b)(1), 12(b)(6) dismissing the complaint etc. ret - 6/23/78 at 10:00 in room 906.
6-19-78	Filed deft's First amended ANSWER and counterclaims.
6-06-79	Fld OPINION #48679 pltffs 1981 claims are denied & dfts section 796k counterclaim for atty's fees are dsmd. All other motion [sic] are denied TENNEY, J m/n

DATE	FILINGS—PROCEEDINGS
8-10-79	Filed Opinion #48964—defts question concerning the relationship of Title VII to the Treaty is hereby certified; all other applications are Denied. TENNEY, J. m/n
11-30-79	Filed OPINION # 49381 . . . Finally, the Court directs that its August 9, 1979 opinion and order be amended in the manner indicated herein. Tenney, J. m/n
3-10-80	Fld pltff's REPLY TO COUNTERCLAIMS of deft's.

Relevant Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Case No. 80-7418

SUMITOMO SHOJI AMERICA, INC.,
Defendant-Appellant,

—against—

LISA M. AVIGLIANO, *et al.*,
Plaintiffs-Appellees.

DATE	FILINGS—PROCEEDINGS
8-16-79	Movant Sumitomo Shoji America, Inc. motion for leave to appeal filed pfs. 3379
8-17-79	Order denying motion for leave to appeal pursuant to 28 USC § 1292(b) without reling the merits without prejudice to the motion's being renewed after Judge Tenney has had an opportunity to consider the Hicks affidavit (Exhibit I) filed.
12-10-79	Movant Sumitomo Shoji America, Inc. petition for leave to appeal filed, pfs. 1148.
1-24-80	Order denying movant Sumitomo Shoji America motion for leave to appeal filed.
2-20-80	Movant Sumitomo Shoji America, Inc. motion for rehearing with suggestion for en banc reconsideration filed 1865 [illegible]
5-19-80	Order granting motion for rehearing; further ordered *granting leave to appeal filed* (JLO, JON, EVG)

DATE	FILINGS—PROCEEDINGS
10-01-80	Appellant Sumitomo motion for reopening record on appeal, pfs. filed. Appellant Sumitomo motion for striking material submitted by EEOC pfs. filed.
10-03-80	Appellees Avigliano, et al. affidavit in opposition to motion for reopening record on appeal and for order striking material, pfs. filed.
10-06-80	Order that motion to reopen the record on appeal and to strike material submitted by the EEOC is set down for argument with the appeal on October 17, 1980 filed (JEL, WRM, TJM)
1-09-81	Case affirmed and remanded, published opinion, WRM
1-09-81	Judgment filed

Summons and Complaint Dated November 21, 1977

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER, ELIZABETH WONG,

Plaintiffs,

—v.—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon LEWIS M. STEEL, ESQ., EISNER, LEVY, STEEL & BELLMAN, P.C., plaintiff's attorney, whose address 351 Broadway, New York, New York 10013 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Illegible]
Clerk of Court.

[Illegible]
Deputy Clerk.

Dated: November 21, 1977

[Seal of Court]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER, ELIZABETH WONG, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

COMPLAINT

CLASS ACTION

JURISDICTION

1. This case involves sex and national origin discrimination in employment. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., §§ 1131, 1343, 2201, and 2202. This case arises under the Equal Employment Opportunity Act of 1964, 42 U.S.C., § 2000e, *et. seq.*, 42 U.S.C., § 1981, and the Thirteenth Amendment to the United States Constitution.

THE PARTIES

2. Plaintiffs, Avigliano, Chenicek, Cristofari, Cummins, Mandelbaum, Mannina, Meisels, Pacheco, Schneider, Silberstein, and Wong, are female citizens of the United States. They

reside in the State of New York, with the exception of Mandelbaum, who resides in the State of New Jersey.

3. Plaintiff Turner is a citizen of Japan, who resides in the State of New York.

4. Plaintiffs Avigliano, Cristofari, Pacheco, and Wong are presently employed by defendant at its 345 Park Avenue, New York, New York office.

5. Plaintiffs Mannina, Schneider and Turner are employees of the defendant presently on maternity leave.

6. Plaintiffs Chenicek, Cummins, Mandelbaum, Meisels, and Silberstein, are former employees of defendant, who left their employment with the defendant because of its discriminatory practices.

7. Defendant Sumitomo Shoji America, Inc. is a corporate entity doing business in the State of New York, and upon information and belief, incorporated under the laws of the State of New York. The defendant maintains a principal office at 345 Park Avenue, New York, New York 10022.

CLASS ACTION ALLEGATIONS

8. Plaintiffs bring this as a class action pursuant to 23(a) and (b) (2), of the Federal Rules of Civil Procedure, on their own behalf and on behalf of all women who have worked for the defendant, are working for the defendant, have left the employ of the defendant because of its discriminatory policies, or may seek employment with the defendant. The members of this class, or classes, are discriminated against in ways which deprive them or have deprived them of equal employment opportunities by reason of their sex, and/or nationality.

9. As to the class or classes described in paragraph 5 of the Complaint:

(1) The number of members in said class or classes is in the thousands and is, therefore, so numerous that joinder of all members is impracticable;

(2) There are questions of law and fact common to the class or classes, said common questions being whether the customs, practices and policies of defendant violate their Federal civil rights;

(3) The claims of the plaintiffs are typical of the class or classes;

(4) The plaintiffs will fairly and adequately protect the interest of the class or classes as they are women, and with the exception of plaintiff Turner, citizens of the United States desirous of obtaining equality for women and equality for United States citizens;

(5) The defendant has acted or failed to act on grounds applicable generally to the class or classes, thus making final relief appropriate with respect to the class or classes as a whole.

JURISDICTIONAL PREREQUISITES

10. Plaintiffs Avigliano, Cristofari, Cummins, Mandelbaum, Mannina, Meisels, Pacheco, Schneider, Silberstein, Turner, and Wong have filed timely and proper complaints before the Equal Employment Opportunity Commission, alleging denial by defendant of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C., § 2000e, *et. seq.*

11. On or about October 21, 1977, plaintiffs were advised that they were entitled to institute a civil action in the appropriate United States District Court within ninety (90) days of receipt of their notices of right to sue. A copy of said notices of right to sue is attached hereto and made a part hereof, and marked Exhibits A-1 to A-11.

FIRST CAUSE OF ACTION

12. Defendant has engaged in unlawful employment practices against plaintiffs and the class and/or classes they represent by:

(a) Discriminating against women by restricting them to clerical jobs;

(b) Discriminating against women by refusing to train them or promote them to executive, managerial, and/or sales positions.

SECOND CAUSE OF ACTION

13. Defendant has engaged in unlawful employment practices against plaintiffs Avigliano, Chenicek, Cristofari, Cummins, Mandelbaum, Mannina, Meisels, Pacheco, Schneider, Silberstein, Wong, and the class or classes they represent, by:

(a) Discriminating against plaintiffs on the basis of nationality by restricting them to clerical jobs;

(b) Discriminating against these plaintiffs on the basis of nationality by refusing to train them or promote them to executive, managerial, and/or sales positions.

THIRD CAUSE OF ACTION ON BEHALF OF ELIZABETH WONG

14. On or about December 7, 1977, the defendant increased the work load and responsibilities of plaintiff Wong and refused to give her additional pay or to promote her.

15. Plaintiff Wong alleges upon information and belief that defendant took this action in reprisal for the filing of her charge with the Equal Employment Opportunity Commission.

16. On or about September 28, 1977, plaintiff Wong filed an additional charge with the Equal Employment Opportunity Commission alleging that she was retaliated against for the filing of her initial charge.

17. Plaintiff Wong alleges upon information and belief, that the Equal Employment Opportunity Commission will no longer process her retaliation charge, after issuing her a right to sue letter with regard to her initial charge. Therefore, plaintiff Wong has exhausted all procedural requirements, and may properly allege retaliation in this complaint.

EQUITY

18. The plaintiffs and those they represent have no adequate or complete remedy at law to redress the wrongs alleged, and this suit for a permanent injunction is the only means of securing adequate relief. Plaintiffs and those they represent are now suffering and will continue to suffer irreparable injury from defendant's policies, practices and customs of discrimination in its employment practices unless this Court enjoins such policies, practices and customs.

WHEREFORE, plaintiffs respectfully request this Court:

(a) To assign this case for a hearing at the earliest possible date and cause the case to be expedited in every possible way;

(b) Issue a permanent injunction:

(1) Enjoining defendant from engaging in the aforesaid unlawful employment practices;

(2) Directing defendant to promote plaintiffs and the class or classes they represent to executive, managerial, and/or sales positions;

(3) Directing defendant to institute a training program to upgrade plaintiffs and the class or classes they represent and to take such affirmative steps as may be necessary to remedy the effects of defendant's discriminatory practices;

(4) Enjoining defendant from discriminating on the basis of sex and nationality in hiring new employees.

(c) Award plaintiffs and their class or classes:

(1) Compensatory and punitive damages for injuries suffered by plaintiffs and the class or classes they represent by reason of defendant's unlawful employment practices;

(2) The costs of this action together with reasonable attorneys fees.

(d) Grant plaintiffs and the class or classes they represent such other and further relief as may be necessary and proper.

Dated: New York, New York
November 21, 1977

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, New York 10013
(212) 966-9620

By: /s/ LEWIS M. STEEL
Lewis M. Steel

Exhibit A-1

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Lisa M. Avagliano
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1366

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-2

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Rosemary T. Cristofari
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1361

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-3

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Catherine Cummins
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1367

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-4

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Raellen Mandelbaum
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1362

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-5

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Maria Mannina
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1363

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-6

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Sharon Meisels
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1364

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-7

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Frances Pacheco
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1744

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-8

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Joanne Schneider
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-0049

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-9

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Janice Silberstein
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1360

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-10

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Reiko Turner
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1670

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

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If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e--5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Exhibit A-11

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:
Ms. Elizabeth Wong
c/o Lewis M. Steel, Esq.
351 Broadway
New York, New York 10013

FROM:
Equal Employment Opportunity Comm.
New York District Office
90 Church Street, Room 1301
New York, New York 10007

CHARGE NUMBER:
021-77-1365

EEOC REPRESENTATIVE
Ralph Munoz, District Counsel

TELEPHONE NUMBER
264-7167

(See Section 706(f) (1) and (f) (3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

☐ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its administrative process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue the Commission is terminating any further processing of this charge.

☐ It has been determined that the Commission will continue to process your charge.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e—5(f) (1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. *Your request to the U.S. District Court should be made well in advance of the 90-day period mentioned above.*

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of the Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

/s/ ARTHUR W. STERN
Arthur W. Stern, District Director
(Typed Name and Title of EEOC Official)

Date: October 27, 1977

cc: Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

Defendant's Answers to Plaintiffs' Interrogatories Sworn to February 3, 1978

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

76 Civ. 5641 (CHT) [sic]

LISA M. AVIGLIANO, *et al.*,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES

Defendant Sumitomo Shoji America, Inc. (hereinafter "Sumitomo") hereby answers "Plaintiffs' First Interrogatories and Request for Production of Documents" as follows:

INTERROGATORY

1. In what state of the United States is the Corporation incorporated?

ANSWER

1. New York.

INTERROGATORY

2. State whether the Corporation is a subsidiary of any other corporation. If so, state the name of the parent and state the location of the parent's principal offices.

ANSWER

2. Sumitomo is a wholly-owned subsidiary of Sumitomo Shoji Kaisha, Ltd., a Japanese corporation which maintains its principal place of business at 15, Kitahama 5-Chome, Higashi-Ku, Osaka, Japan, and 2-2 Hitosubashi 1-Chome, Chiyoda Ku, Tokyo, Japan.

INTERROGATORY

3. State where the Corporation maintains its principal office, giving the full address.

ANSWER

3. 345 Park Avenue, New York, New York 10022.

INTERROGATORY

4. (As amended by December 29, 1977 letter of counsel for plaintiffs to counsel for defendant): State where the corporation maintains other offices, listing the full address of each office.

(a) As to each office, state whether the personnel practices in effect are substantially the same as the personnel practices in effect in the Corporation's principal office.

(b) As to each office where the personnel policies are not substantially the same as the policies in effect at the principal office, please state in detail how the policies differ from the principal office in respect to methods of hiring, promotion, testing, transfer, requirements for any job title, or other distinctions relating to the question of qualifications to fill similar job titles or perform similar work as may exist at the principal offices.

(c) State whether any employee of the Corporation has general authority over personnel practices in all of the offices of the Corporation. If the answer to the question is in the affirmative, please state the name, title, and address of said employee, and set forth the scope of his authority over the personnel practices in all offices. If the answer is in the negative, state who has the general supervisory authority over the personnel offices in each of the Corporation's offices, and state whether said employee or employees report to anyone at the principal office, or any other office and, if so, to whom, listing addresses for all employees and titles mentioned in this answer.

ANSWER

4. 350 Fifth Avenue, Room 7100
New York, New York 10001

John Hancock Center,
Suite 3818
875 North Michigan Avenue
Chicago, Illinois 60611

26500 Northwestern Highway
Suite 406
Southfield, Michigan 48076

1100 Milam Building,
Suite 3434
Houston, Texas 77022

Room 315, Cotton Exchange
Building
Dallas, Texas 75201

One California St., Suite 630
San Francisco, California
94111

900 Fourth Ave., Suite 3101
Seattle, Washington 98164

3108 First National
Bank Tower
1300 S.W. Fifth Avenue
Portland, Oregon 97201

1014 City National
Bank Bldg.
606 South Olive Street
Los Angeles, Calif. 90014

Room 3929, United States
Steel Building
600 Grant Street
Pittsburgh, Pennsylvania
15219

(a) No.

(b) Each branch office, except the office at 350 Fifth Avenue, New York, New York has autonomous control over salary, hiring, promotion, testing, transfer and requirements for job titles of certain employees including secretaries, clerks, office business machine operators, maintenance personnel, guards, chauffeurs, messengers, receptionists, telex machine operators, etc. Such policies differ according to standards set by the branches, labor conditions and standards in the areas where the branches are located, customs and policies in the areas where the branches are located, and the requirements of each of the branches.

(c) No. Insofar as the employees described in subparagraph (b) hereof are concerned, personnel practices of the branches, except the office at 350 Fifth Avenue, New York, New York, are under general supervisory authority of the general managers of each such branch, who do not report on such matters except on an informational basis to Sumitomo's principal office (addresses for each of such general managers are furnished above). In New York, insofar as the employees described in subparagraph (b) hereof are concerned, personnel practices of both the offices at 345 Park Avenue and at 350 Fifth Avenue are under the general supervisory authority of Mr. H. Tsuwano, Personnel Manager, 345 Park Avenue, New York, New York 10022.

INTERROGATORY

5. State the total number of employees employed by the Corporation.

ANSWER

5. 464 (approximately, as at December 1, 1977).

INTERROGATORY

6. State the total number of employees employed by the Corporation at each of its offices.

ANSWER

6. New York, New York (345 Park Avenue)	209
New York, New York (350 Fifth Avenue)	21
Pittsburgh, Pennsylvania	2
Chicago, Illinois	73
Detroit, Michigan	2
Houston, Texas	36
Dallas, Texas	6
San Francisco, California	44
Seattle, Washington	11
Portland, Oregon	12
Los Angeles, California	48
	464

INTERROGATORY

7. Does the Corporation use job titles? If the answer is yes, list all job titles which have been utilized by the Corporation since April 1, 1969, and state as to each job title when it came into being, and until what date the job title was utilized.

ANSWER

Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer this Interrogatory with information as of December 1, 1977 without prejudice to Sumitomo's right to object to furnishing an answer to this Interrogatory for any period of time prior to December 1, 1977. Sumitomo does not object to answering this Interrogatory for the period December 1, 1974 through December 1, 1977 but objects to furnishing information for any period prior thereto (see Sumitomo's Objections to Plaintiffs' Interrogatories, hereinafter "Sumitomo's Objections", served and filed herewith). With respect to the period December 1, 1974 through December 1, 1977, Sumitomo's answer is as follows:

7. Yes. General Manager, assistant general manager, department manager, sub-branch manager, manager, assistant manager, assistant to general manager, administrator, supervisor,

senior clerk, senior secretary, clerk, secretary, business machine operator, maintenance, salesperson, guard, chauffeur, messenger, receptionist, telex machine operator. Not all such titles are formally assigned and other designations may be used from time to time. All such titles were used prior to December 1, 1974 and all are still utilized except supervisor, use of which was discontinued September 1, 1977.

INTERROGATORY

8. Does the Corporation use job descriptions? If the answer is yes, identify all job descriptions which have been in use since April 1, 1969, and annex copies of all documents containing job descriptions which have been utilized at any time by the Corporation since April 1, 1969 to date, specifying the periods when said descriptions have been utilized.

ANSWER

8. No.

INTERROGATORY

9. If the Corporation has utilized job descriptions which have not been reduced to writing, please list each job by title, stating next to each job what the description of the job is, and state when the Corporation has employed persons to fill such job from April 1, 1969 until the present.

ANSWER

9. Not applicable.

INTERROGATORY

10. Does the Corporation classify employees into categories such as executive, managerial, professional, technical, clerical, etc.? If the answer is in the affirmative, identify all documents which describe how the classification is accomplished, and attach copies to these answers. Also list all job titles which fall within each category.

ANSWER

10. Yes. Sumitomo maintains no documents which describe how such classification is accomplished. Job titles are not formally tied to employee classification nor do job titles in all cases fall exclusively within one employee classification. The following list relates job titles, informal or otherwise, to employee classification only to the extent that such job titles usually do fall within employee classification:

Employee Classification	*Job Title Usually Within Classification*
Executive	General Manager, Assistant General Manager and Department Manager (if made executives)
Managerial and Supervisory	General Manager, Assistant General Manager, Department Manager, Sub-branch Manager, Manager, Assistant Manager, Assistant to General Manager, Administrator, Senior Clerk, Senior Secretary
Others	Clerk, Secretary, Business Machine Operator, Maintenance, Salesperson, Guard, Chauffeur, Messenger, Receptionist, Telex Machine Operator.

INTERROGATORY

11. If the Corporation orally classifies employees, and/or refers to employees as executive, managerial, professional, technical, clerical, etc., please list all such categories utilized and list all job titles which fall within each category.

ANSWER

11. See answer to Interrogatory 10, above.

INTERROGATORY

12. As of the last day of the pay period closest to December 1, 1977, give:

(a) the number of female employees at each of the Corporation's offices, further broken down to give:

1. the number of female employees at each office by category, such as executive, managerial, professional, clerical, etc.;

2. the number of female employees at each office, by job title.

(b) the number of employees whose country of national origin is not Japan at each of the Corporation's offices, further broken down to give:

1. the number of employees whose country of national origin is not Japan at each office by category, such as executive, managerial, professional, clerical, etc.;

2. the number of employees whose country of national origin is not Japan at each office by job title.

ANSWER

12.

(a) Sumitomo has no objection to furnishing plaintiffs with the number of female employees at each of Sumitomo's offices. As to the balance of the information requested by Interrogatory 12(a), see Sumitomo's Objections served and filed herewith.

Office	*Number of Female Employees at Office*
New York (345 Park Avenue)	80
New York (350 Fifth Avenue)	16
Pittsburgh	1

Chicago	28
Detroit	1
Houston	14
Dallas	2
San Francisco	23
Seattle	4
Portland	6
Los Angeles	24

(b) Sumitomo does not maintain information as to "national origin" of its employees.

INTERROGATORY

13. Does the Corporation utilize any selection criteria by which it determines, or which aids in the determination of whom it will hire for jobs, or promote? If the answer to this question is in the affirmative, please answer the following additional questions.

(a) Has the criteria which is or has been utilized in writing? If so, identify all documents containing such criteria from April 1, 1969 to date, and attach copies of all such documents to the responses to these interrogatories.

(b) If the criteria utilized has not been reduced to writing, list what the criteria is for each job title and/or classification utilized by the Corporation since April 1, 1969 to date in descending order of importance, specifying for what period the criteria has been in effect and state whether the criteria has changed from time to time, and, if so, list the appropriate changes for the relevant time periods.

ANSWER

13. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

14. Does the Corporation utilize career paths and/or progression ladders as methods of determining eligibility for promotion? If the answer to this interrogatory is yes, please answer the following questions:

(a) Does the Corporation have any documents which identify career paths or progression ladders? If so, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories.

(b) If the Corporation utilizes career paths and/or progression ladders which are oral, please set forth any such career path or progression ladders which have been utilized from April 1, 1969 to date, specifying the period in which each career path and/or progression ladder was utilized.

ANSWER

14. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

15. Does the Corporation have a table of organization, or other chart or document(s) which sets forth the Corporation's supervisory chain of command? If such a document or documents exist, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories. If a table of organization exists which has not been reduced to writing, please set it forth in this answer.

ANSWER

15. Yes. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer this Interrogatory with information as of December 1, 1977 without prejudice to Sumitomo's right to object to furnishing an answer to this Interrogatory for any period of time prior to December 1, 1977. Sumitomo does

not object to answering this Interrogatory for the period December 1, 1974 through December 1, 1977 but objects to furnishing such information for any period prior thereto (see Sumitomo's Objections served and filed herewith). With respect to Sumitomo's documents reflecting its supervisory chain of command as of December 1, 1977, see Exhibit "1" hereto.*

INTERROGATORY

16. Has the Corporation since April 1, 1969 to date, utilized an employee's country of national origin, for example, Japanese citizenship, as a criterion for eligibility to hold certain jobs with the Corporation? If the answer to this interrogatory is yes, please answer the following questions:

(a) For which jobs has this criterion been utilized, and state the time period of utilization from April 1, 1969 to date.

(b) For any of the jobs listed in answer to subsection (a) above, is the criterion mandatory? If so, state for which jobs the criterion is mandatory, and over what time periods from April 1, 1969 to date.

ANSWER

16. No.

INTERROGATORY

17. Has the Corporation utilized sex as a criterion for eligibility for any job with the Corporation from April 1, 1969 to date? If the answer to this question is yes, please answer the following questions:

(a) For which jobs has this criterion been utilized, and state the time period of utilization from April 1, 1969 to date.

(b) For any of the jobs listed in answer to subsection (a) above, is the criterion mandatory? If so, state for which jobs

* Information for the period commencing, December 1, 1974 will be furnished at a later date to be mutually agreed upon by counsel.

the criterion is mandatory, and over what time periods from April 1, 1969 to date.

ANSWER

17. No.

INTERROGATORY

18. Has the Corporation filed with the Equal Employment Opportunity Commission Standard Form 100, known as the Employer Information Report EEO-1? If the answer is yes, please state for what years since 1969 this form has been filed, and attach a copy of the form filed for each year through the present year.

ANSWER

18. Yes. Sumitomo does not object to furnishing the information requested by this Interrogatory for its New York City offices for the years 1975, 1976 (and 1977 when available) but objects to furnishing such information for any period prior thereto, and for any of its offices other than New York (see Sumitomo's Objections served and filed herewith). For Employer Information Report EEO-1 for Sumitomo's New York City offices for the years 1975 and 1976, see Exhibit "2" hereto.

INTERROGATORY

19. Does the Corporation maintain any documents reflecting the composition of its employees, containing break downs of number of employees by sex, race, and/or country of national origin? If the answer to this question is yes, specify for what years since April 1, 1969 such documents have been kept, identify each document, and annex a copy of each document to the answers to these interrogatories.

ANSWER

19. No.

INTERROGATORY

20. List the name, age, address, sex, country of national origin, and school years completed by each employee who is presently employed by the Corporation, and with respect to each such employee state:

(a) the office in which each employee is employed;

(b) all job titles held since date of initial employment, including present job title;

(c) the date of each job title change;

(d) salary received during the 12 month period from December 1, 1976 through November 30, 1977;

(e) the date of initial employment.

ANSWER

20. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

21. List the name, age, address, school years completed of each woman hired by the Corporation who has left the employ of the Corporation since October 8, 1973, and with respect to each such former employee state:

(a) the date of initial employment;

(b) all job titles held since date of initial employment;

(c) date of each job title change.

ANSWER

21. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

22. List the name, ages, address, school years completed of each person whose country of national origin is not Japan hired by the Corporation who has left the employ of the

Corporation since October 8, 1973, and with respect to each such former employee, state:

(a) the date of initial employment;

(b) all job titles held since date of initial employment;

(c) date of each job title change.

ANSWER

22. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

23. State whether the Corporation has maintained a personnel manual or any document containing personnel policies since April 1, 1969 to date. If the answer is yes, identify the manual or manuals, and/or documents stating dates in which each has been in use by the Corporation and attach copies to the answers to these interrogatories.

ANSWER

23. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

24. State whether the Corporation has any documents setting forth employee pay rates and/or benefits, or which set forth opportunities for employee advancement, or materials which in any way explain career opportunities with the Corporation. If the answer is yes, identify all such documents from April 1, 1969 to date, and attach copies to the answers to these interrogatories.

ANSWER

24. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

25. List the name, address, sex, country of national origin, title, and office where employed of all employees from April 1, 1969 to date who have held, or continue to hold, supervisory positions. With respect to each such employee, state:

(a) Date of initial employment;

(b) All job titles held since date of initial employment, including present job title.

(c) If not presently employed by the Corporation, the date the employee left the Corporation.

(d) Date of each hob [sic] title changed.

(e) Describe the unit, department, section, or other component of the Corporation which the employee supervises, or supervised prior to leaving the Corporation.

(f) The number of employees under the supervision of the supervisor at present, or when the supervisor left the employment of the Corporation.

ANSWER

25. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

26. List the name, age, address, sex, country of national origin, and school years completed by each present employee of the Corporation, or former employee of the Corporation who worked with the Corporation during the period April 1, 1969 to date, who functions or functioned in a sales or selling capacity. With respect to each such employee, state:

(a) date of intitial employment;

(b) all job titles held since date of initial employment, including present job title;

(c) date of each hob [sic] title change;

(d) salary, including all commission payments, etc.

ANSWER

26. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

27. Does the Corporation have any written criteria it utilizes to determine eligibility for hire, transfer or promotion to sales or selling jobs? If the answer is yes, identify each document which contains such criteria and attach copies to the answers to these interrogatories.

ANSWER

27. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

28. If the Corporation does not have written criteria with regard to eligibility for sales or selling jobs, does the Corporation have oral criteria? If the answer is yes, list all criteria utilized in order of importance, stating which, if any, of the criteria utilized are mandatory.

ANSWER

28. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

29. State whether the Corporation has any standard procedure by which an employee may seek a promotion, or by which the Corporation grants promotions on its own initiative. If the answer to this interrogatory is in the affirmative, please answer the following questions:

(a) Is the procedure in writing? If the answer to this question is in the affirmative, please answer the following:

(i) identify the document or documents and attach copies to the answers to these interrogatories;

(ii) by whom were the procedures promulgated?

(iii) how were they communicated to the employees?

(iv) to employees in which job titles were the procedures communicated, and when were they communicated?

ANSWER

29. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

30. Does the Corporation have oral, rather than written standard procedures for promotion? If the answer is yes, answer the following additional questions:

(a) By whom are the oral procedures promulgated?

(b) How are they communicated?

(c) To which employees, and when?

(d) State in detail what the procedures are.

ANSWER

30. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

31. Does the Corporation have oral, rather than written procedures by which employees may becomes salespersons? If the answer is yes, answer the following questions:

(a) By whom are the oral procedures promulgated?

(b) How are they communicated?

(c) To what employees and when?

(d) State in detail what the procedures are.

ANSWER

31. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

32. Has the Corporation utilized any tests from April 1, 1969 to date for the purpose of selecting applicants for employment in, or promotion or transfer to, any job. If the answer to this question is yes, answer the following questions.

(a) Identify all such tests and attach copies to the answers to these interrogatories, and state when each test was used.

(b) As to each test, unless the test is attached to the answers, describe in detail the nature of the test and the questions asked.

(c) As to each test, describe the criteria which the Corporation applied, including the passing grade, etc.

(d) As to each test, state who judged or judges the test results, and/or made or makes determinations as a result thereof.

ANSWER

32. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

33. State whether the Corporation has had, or presently has a training or education program which employees may utilize

to seek promotions or transfers. If so, describe in detail, including the dates of initiation and termination; what employees are eligible for inclusion; how the existence of the program was communicated to employees; and, the numbers of employees who enrolled, year by year, from April 1, 1969 to date, indicating sex and country of national origin during each program. Also state as to each such program whether the Corporation actually ran the program, and if not, who did. Also list the address where each program was conducted.

ANSWER

33. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

34. State whether the Corporation utilizes any system of written evaluations or efficiency reports regarding the quality and quantity of work performed by employees. If so, answer the following:

(a) Identify all such documents, stating during what period of time from April 1, 1969 to date each report was utilized, and attach blank copies of each form utilized.

(b) For each evaluation utilized, state which categories of employees by job title were, or are, evaluated.

(c) For each category of employee by job title evaluated, state how often they are evaluated, listing the date of the last evaluation.

ANSWER

34. Counsel for plaintiffs and Sumitomo have agreed that Sumitomo may answer or object to this Interrogatory at a later date to be mutually agreed upon by counsel.

INTERROGATORY

35. Does the Corporation maintain personnel files for individual employees? If the answer is in the affirmative, answer the following:

(a) Are the files maintained on all employees. If not, list the job titles for which such files are maintained.

(b) Identify all standard documents contained in such employee personnel file, stating during what period of time from April 1, 1969 to date, each document was utilized, and attach blank copies of each form utilized. If different types of files are maintained for different categories of employees, or for employees with different job titles, answer this question category by category, and/or job title by job title.

ANSWER

35. Yes.

(a) Yes.

(b) See Sumitomo's Objections served and filed herewith.

INTERROGATORY

36. Has the Corporation ever been charged with discrimination on the basis of sex and/or national origin in any other court, or before any public agency, federal, state or local, in any jurisdiction of the United States? If the answer is in the affirmative, list each case name individually, setting forth the forum, the case identification number, and the status of each case.

ANSWER

36. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

37. With regard to each question above which requires the Corporation to set forth information which is not based on documents, please give the source of information, stating the name and address of the informant(s).

ANSWER

37. Mr. M. Tsuge, Manager
Bunker Section
Petroleum Products Department
Sumitomo Shoji Kaisha, Ltd.
24-1, Kandanishikicho
3-chome, Chiyoda-ku
Tokyo, Japan

Mr. H. Nakagawa, Manager, Legal
Department
Sumitomo Shoji America, Inc.
345 Park Avenue
New York, New York 10022

INTERROGATORY

38. Identify separately and with particularity sufficient for use as a description in a subpoena each document (not already identified in the answers to the foregoing interrogatories or produced in response to the requests contained herein) which contains any of the information given in answer to each of the foregoing interrogatories.

ANSWER

38. See Sumitomo's Objections served and filed herewith.

INTERROGATORY

39. State whether the Corporation asserts that either sex and/or country of national origin is a *bona fide* occupational qualification (hereinafter "b.f.o.q.") for holding of any job

with the Corporation. If the answer is in the affirmative, list all job titles and/or categories in which the Corporation asserts a b.f.o.q. defense; listing for each job title or job category what defense is asserted, and stating in detail the basis for the assertion of the defense.

ANSWER

39. No.

Dated: New York, New York
February 3, 1978

/s/ H. NAKAGAWA
H. Nakagawa

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

H. Nakagawa, being duly sworn, deposes and says that deponent is Manager, Legal Department of Sumitomo Shoji America, Inc., defendant in the within action, that he has read the foregoing answers to plaintiffs' first interrogatories and request for production of documents and knows the contents thereof, and that the same is true to deponent's own knowledge except as to matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

/s/ H. NAKAGAWA
H. Nakagawa

Sworn to before me this
3rd day of February, 1978

/s/ PAMELA ROTH
Notary Public

PAMELA ROTH
Notary Public, State of New York
No. 41-4622400
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1979

Exhibit 1

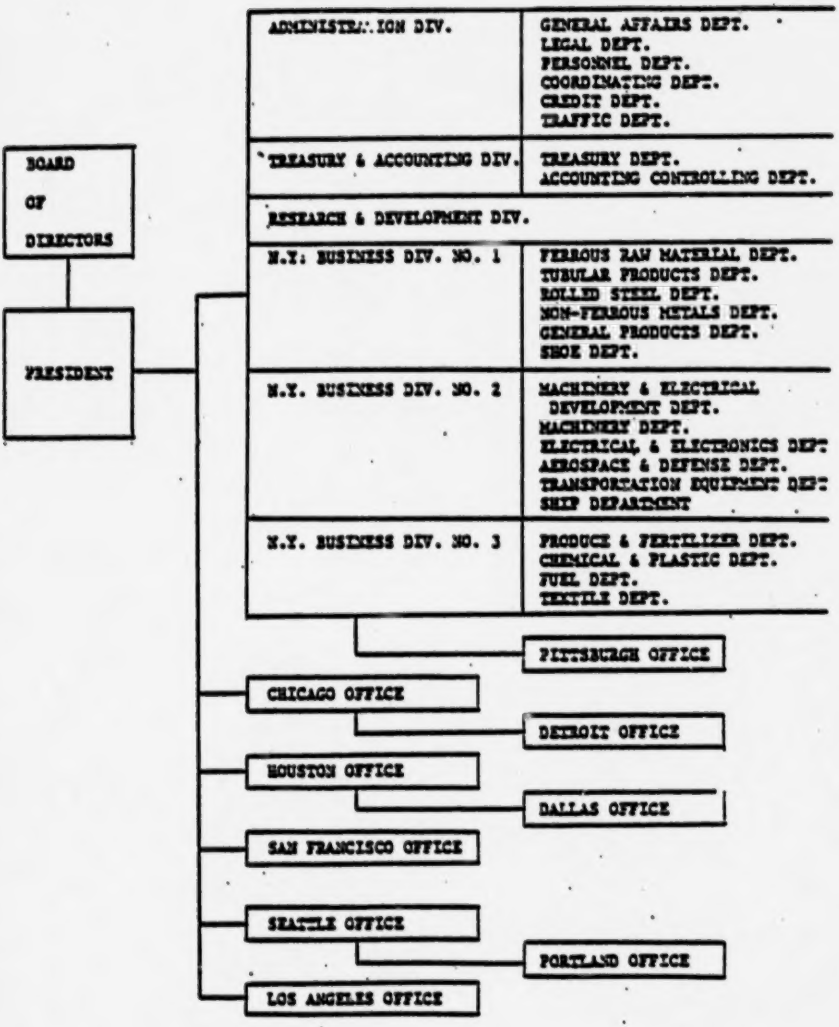
BOARD OF DIRECTORS
PRESIDENT
ADMINISTRATION DIV.
GENERAL AFFAIRS DEPT.
LEGAL DEPT.
PERSONNEL DEPT.
COORDINATING DEPT.
CREDIT DEPT.
TRAFFIC DEPT.
TREASURY & ACCOUNTING DIV.
TREASURY DEPT.
ACCOUNTING CONTROLLING DEPT.
RESEARCH & DEVELOPMENT DIV.
N.Y. BUSINESS DIV. NO. 1
FERROUS RAW MATERIAL DEPT.
TUBULAR PRODUCTS DEPT.
ROLLED STEEL DEPT.
NON-FERROUS METALS DEPT.
GENERAL PRODUCTS DEPT.
SHOE DEPT.
N.Y. BUSINESS DIV. NO. 2
MACHINERY & ELECTRICAL DEVELOPMENT DEPT.
MACHINERY DEPT.
ELECTRICAL & ELECTRONICS DEPT
AEROSPACE & DEFENSE DEPT.
TRANSPORTATION EQUIPMENT DEPT
SHIP DEPARTMENT
N.Y. BUSINESS DIV. NO. 3
PRODUCE & FERTILIZER DEPT.
CHEMICAL & PLASTIC DEPT.
FUEL DEPT.
TEXTILE DEPT.
PITTSBURGH OFFICE
CHICAGO OFFICE
DETROIT OFFICE
HOUSTON OFFICE
DALLAS OFFICE
SAN FRANCISCO OFFICE
SEATTLE OFFICE
PORTLAND OFFICE
LOS ANGELES OFFICE

Exhibit 2

EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER INFORMATION REPORT EEO-1

[stamp bearing year 1975]

[Comment: 3 columns of two sets of numbers illegible]

[illegible words]

- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance

SUMITOMO SHOJI AMERICA, INC.
345 PARK AVENUE
NEW YORK, N.Y. 10022

P 9-0024400 MC 07471P

2 of 3 COMPANY UNITS

PLEASE USE THIS FORM FOR HEADQUARTERS REPORT.

58a

Section A—TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted(MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:

(2) ☐ Consolidated Report
(3) ☒ Headquarters Unit Report
(4) ☐ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B—COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (if same as label, skip to item 2, this section)

a.

Address (Number and street)	City or town	County	State	ZIP code	b.

b. Employer Identification No.

2. Establishment for which this report is filed.

a. Name of establishment SUMITOMO SHOJI AMERICA, INC.

c.

Address (Number and street)	City or town	County	State	ZIP code	d.
345 Park Avenue	New York		N.Y.	10022	

b. Employer Identification No. (if same as label, skip.)

3. Parent of affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company | b. Employer Identification No.

Address (Number and street)	City or town	County	State	ZIP code

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

[x] Yes	[ ] No	1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?
[x] Yes	[ ] No	2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

NOTE: If the answer is NO to BOTH questions, skip to Section G; otherwise complete ENTIRE form.

[ ] Yes	[x] No	3. Does the company or any of its establishments (a) have a prime contract with any agency of the Federal Government, a Federally-assisted construction contract, or a subcontract at any tier under any prime Government contract, amounting to more than $10,000; or (b) serve as a depository of Federal Government funds; or (c) serve as an issuing and paying agent of U.S. Savings Bonds and Notes; or (d) hold a Federal Government bill of lading in any amount?

Job Categories (See Appendix (4) for definitions)	TOTAL EMPLOYEES IN ESTABLISHMENT			MINORITY GROUP EMPLOYEES (See Appendix (5) for definitions)							
				MALE				FEMALE			
	Total Employees Including Minorities (1)	Total Male Including Minorities (2)	Total Female Including Minorities (3)	Negro (4)	Oriental (5)	American Indian* (6)	Spanish Surnamed American (7)	Negro (8)	Oriental (9)	American Indian* (10)	Spanish Surnamed American (11)
Officials and managers	30	30			27						
Professionals	29	29			24						
Technicians	1	1			1						
Sales workers	44	44			40						
Office and clerical	100	25	75		5			2	11		8
Craftsmen (Skilled)											
Operatives (Semi-skilled)	1	1									
Laborers (Unskilled)											
Service workers											
TOTAL →	205	130	75		97			2	11		8
Total employment reported in previous EEO-1 report	173	104	69		79			1	10		7

(The trainees below should also be included in the figures for the appropriate occupational categories above)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Formal On-the-job trainees	White collar											
	Production											

*In Alaska include Eskimos and Aleuts with American Indians

[Comment: directions on top of second page of form illegible]

1. NOTE: On consolidated report, skip questions 2-5 and Section E.
2. How was information as to race or ethnic group in Section D obtained?
   1 [X] Visual Survey 3 [ ] Other—Specify .....
   2 [X] Employment Record
3. Dates of payroll period used—
   4/1—4/30/75
4. Pay period of last report submitted for this establishment
   3/1—3/31/74
5. Does this establishment employ apprentices?
   This year? 1 [ ] Yes 2 [X] No
   Last year? 1 [ ] Yes 2 [X] No

Section E—ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
   1 [X] Yes 2 [ ] No 3 [ ] Did not report last year 4 [ ] Reported on combined basis

2. Is the major business activity at this establishment the same as that reported last year?
   1 [X] Yes 2 [ ] No 3 [ ] No report last year 4 [ ] Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

Import & Export

e.

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

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Section G—CERTIFICATION (See instructions G)

Check one

1. ☐ All reports are accurate and were prepared in accordance with the instructions (check on consolidated only).
2. ☒ This report is accurate and was prepared in accordance with the instructions.

Name of Authorized Official	Title	Signature	Date
Shigehiro Kumamoto	Executive Vice President		5/29/75

Name of person to contact regarding this report (Type or print)	Address (Number and street)				
Allan Roberts					
Title	**City and State**	**ZIP code**	**Telephone Area Code**	**Number**	**Extension**
Ass't Mgr—Personnel	New York, N.Y.	10022	212	935-7000	

All reports and information obtained from individual reports will be kept confidential as required by Section 709 (e) of Title VII
WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE TITLE 18, SECTION 1001

Exhibit 2

EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER INFORMATION REPORT EEO-1

[illegible words]

- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance

1976 USE THIS FORM FOR YOUR HEADQUARTERS REPORT

S1302700 3 S = 3 SIC = 509

CO = 6102315 U = 6102315 EI = 135612163 6

SUMITOMO SHOJI AMERICA, INC. P 9-0024400 MC 07471P
345 PARK AVENUE
NEW YORK, N.Y. 10022 1 91236440

64a

Section A—TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:

(2) ☐ Consolidated Report
(3) ☒ Headquarters Unit Report
(4) ☐ Individual Establishment Report (submit one for each establishment with 25 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only) _____

Section B—COMPANY IDENTIFICATION *(To be answered by all employers)*

OFFICE USE ONLY

1. Name of Company which owns or controls the establishment for which this report is filed (if same as label, skip to item 2, this section)

a.

Address (Number and street)	City or town	County	State	ZIP code	b.

b. Employer Identification No.

2. Establishment for which this report is filed.

a. Name of establishment SUMITOMO SHOJI AMERICA, INC.

c.

Address (Number and street)	City or town	County	State	ZIP code	d.
345 Park Avenue	New York		N.Y.	10022	

b. Employer Identification No. (if same as label, skip.)

3. Parent of affiliated company (Multi-establishment Employers: Answer on Consolidated Report only)

a. Name of parent or affiliated company

b. Employer Identification No.

Address (Number and street)	City or town	County	State	ZIP code

65a

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

[x] Yes	[ ] No	1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?
[x] Yes	[ ] No	2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?
[ ] Yes	[x] No	3. Does the company or any of its establishments (a) have 50 or more employees *AND* (b) is not exempt as provided by 41 CFR 60-1.5, *AND* either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to $50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?

NOTE: If the answer is yes to ANY of these questions, complete the entire form; otherwise skip to Section G.

[page 2]

Job Categories (See Appendix (5) for definitions)	TOTAL EMPLOYEES IN ESTABLISHMENT: Total Employees Including Minorities (1)	Total Male Including Minorities (2)	Total Female Including Minorities (3)	MINORITY GROUP EMPLOYEES (See Appendix (4) for definitions): MALE: Negro (4)	Oriental (5)	American Indian* (6)	Spanish Surnamed American (7)	FEMALE: Negro (8)	Oriental (9)	American Indian* (10)	Spanish Surnamed American (11)
Officials and managers	31	31			28						
Professionals	35	35			25						
Technicians	5	3	2								1
Sales workers	43	43			37						
Office and clerical	103	16	87		4		1	2	12		9
Craftsmen (Skilled)											
Operatives (Semi-skilled)	2	2									
Laborers (Unskilled)											
Service workers											
TOTAL →	219	130	89		94		1	2	12		10
Total employment reported in previous EEO-1 report	205	130	75		97			2	11		8

(The trainees below should also be included in the figures for the appropriate occupational categories above)

		(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Formal On-the-job trainees	White collar											
	Production											

*In Alaska include Eskimos and Aleuts with American Indians

[Comment: directions on top of second page of form illegible]

1. NOTE: On consolidated report, skip questions 2-5 and Section E.
2. How was information as to race or ethnic group in Section D obtained?
   1 [X] Visual Survey
   2 [X] Employment Record
   3 [ ] Other—Specify .....
3. Dates of payroll period used—
   3/1—31/76
4. Pay period of last report submitted for this establishment
   4/1—30/75
5. Does this establishment employ apprentices?
   This year? 1 [ ] Yes 2 [X] No
   Last year? 1 [ ] Yes 2 [X] No

Section E—ESTABLISHMENT INFORMATION

1. Is the location of the establishment the same as that reported last year?
   1 [X] Yes 2 [ ] No 3 [ ] Did not report last year 4 [ ] Reported on combined basis

2. Is the major business activity at this establishment the same as that reported last year?
   1 [X] Yes 2 [ ] No 3 [ ] No report last year 4 [ ] Reported on combined basis

OFFICE USE ONLY

3. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.

   Import & Export

e.

Section F—REMARKS

Use this item to give any identification data appearing on last report which differs from that given above, explain major changes in composition or reporting units, and other pertinent information.

Section G—CERTIFICATION (See instructions G)

Check one

1. ☐ All reports are accurate and were prepared in accordance with the instructions (check on consolidated only).
2. ☒ This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official	Title	Signature	Date
S. Kumamoto	Executive Vice President		6/30/76

Name of person to contact regarding this report (Type or print)	Address (Number and street)				
Allan Roberts	345 Park Avenue				
Title	**City and State**	**ZIP code**	**Telephone Area Code**	**Number**	**Extension**
Ass't Personnel Mgr.	New York, N.Y.	10022	212	935-7000	

All reports and information obtained from individual reports will be kept confidential as required by Section 709 (e) of Title VII
WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE TITLE 18, SECTION 1001

Defendant's Notice of Motion for an Order Dismissing the Complaint Pursuant to Rule 12(b)(1) and 12(b)(6) Dated May 18, 1978

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of J. Portis Hicks, sworn to May 18, 1978, the Memorandum of Law submitted herewith, and all prior proceedings heretofore had herein, defendant Sumitomo Shoji America, Inc. will move this Court before the Hon. Charles H. Tenney in Room 906, United States Courthouse, Foley Square, New York, New York, at 10:00 A.M. on June 23, 1978 or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b) (6) of the Federal Rules of Civil Procedure dismissing the class action claims of the complaint on the ground that plaintiffs fail to state a claim upon which relief can be granted, and for an order pursuant to Rules 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure dismissing so much of the complaint as purports to assert a claim pursuant to 28 U.S.C. §§ 2201 and 2202 or the Thirteenth Amendment to the United States

Constitution on the ground that such claims fail to invoke the subject matter jurisdiction of this Court and also fail to state a claim upon which relief can be granted.

Dated: New York, New York
May 18, 1978

Yours, etc.

WENDER, MURASE & WHITE
by /s/ J. PORTIS HICKS
(A Member of the Firm)
Attorneys for Defendant Sumitomo Shoji America, Inc.
400 Park Avenue
New York, New York 10022
(212) 832-3333

To: EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, New York 10013

Affidavit of J. Portis Hicks in Support of Motion Sworn to May 18, 1978

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

AFFIDAVIT

State of New York,
County of New York, *ss.:*

J. PORTIS HICKS, being duly sworn, deposes and says:

1. I am a member of the firm of Wender, Murase & White, attorneys herein for Sumitomo Shoji America, Inc. ("Sumitomo"), defendant in this action. I am fully familiar with the facts of this matter, and make this affidavit in support of defendant's motion for an order dismissing the class action claims of the complaint herein on the ground that plaintiffs fail to state claims upon which relief can be granted pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), or pursuant to 42 U.S.C. § 1981. Defendant also moves pursuant to Rule 12(b) (1) and 12(b) (6) of the Federal Rules of Civil Procedure for an order dismissing so much of the complaint as purports to assert a claim for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202 (the Federal Declara-

tory Judgment Act), or pursuant to the Thirteenth Amendment to the United States Constitution, on the ground that such claims fail to invoke the subject matter jurisdiction of this Court, and also fail to state claims upon which relief can be granted.

2. In the main, this motion speaks to the fundamental issue of whether Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), and 42 U.S.C. § 1981, must yield to treaty rights of freedom of choice of employment assured by the Treaty of Friendship, Commerce and Navigation of 1953 between the United States and Japan (4 U.S.T. 2063, T.I.A.S. 2863, hereinafter the "Treaty").

3. Plaintiffs in this action claim that defendant Sumitomo has discriminated against them by reason of their sex (all are females) and by reason of their national origin (all claim to be U.S. citizens, except plaintiff Turner, who claims she is a "citizen" of Japan), and thus violated Title VII of the Civil Rights Act of 1964 as well as 42 U.S.C. § 1981. Plaintiffs claim they have been restricted to clerical jobs and not trained for, or promoted to, "executive, managerial and/or sales positions" (complaint, paras. 12 and 13). In addition, plaintiff Wong asserts an individual claim to the effect that Sumitomo refused to give her additional pay, or promote her, in retaliation for her having filed charges against Sumitomo with the United States Equal Employment Opportunity Commission ("E.E.O.C.").

4. Plaintiffs also purport to assert claims in this litigation pursuant to 28 U.S.C. §§ 2201 and 2202 (the Federal Declaratory Judgment Act), and the Thirteenth Amendment to the United States Constitution. Insofar as their purported claim under the Thirteenth Amendment is concerned, plaintiffs have agreed to "withdraw" such claim, but refuse to agree that such claim will be discontinued with prejudice. According to counsel for plaintiffs, this is because at a later date, the law might change and plaintiffs would then want to reassert their pur-

ported claim of enslavement. Such argument is sheer nonsense. It amounts to nothing more than an assertion of a "right" by plaintiffs to subject Sumitomo to any inappropriate, insufficent or wholly frivolous charge on the theory that should the law change, such claim might later have some basis. Plaintiffs' cavalier attitude, which has caused Sumitomo cost and expense in preparation of its motion relating to the purported Thirteenth Amendment claim, should not be countenanced by this Court. Defendant Sumitomo should be awarded its attorneys' fees for that part of its present motion.

5. Sumitomo is incorporated in New York and operates its business as a wholly-owned subsidiary of Sumitomo Shoji Kaisha, Ltd. ("SSK"), a Japanese corporation.

6. For purposes of Sumitomo's operations in the United States, pursuant to applicable law including the Immigration and Nationality Act and rules and regulations promulgated thereunder, many qualified Japanese nationals have been, and still are, assigned to Sumitomo by its parent company as "treaty trader" personnel to serve in executive and other supervisory, specialist and professional positions.

7. I am informed by Sumitomo and believe that each and every one of the plaintiffs herein originally applied to Sumitomo for employment in secretarial positions (not for employment in the "executive, managerial and/or sales positions" they now purport to seek), and that each and every one of the plaintiffs herein was in fact originally hired by Sumitomo as a secretary.

8. It is well known fact that Japan has few national resources upon which it can rely for production or consumption. Reference to any number of standard works on the subject verifies that since that is the case, Japan depends on foreign trade for survival, and has particularly seen the growth of the institution known as the "trading company" more than any

other nation. See e.g., Ballon, *Japan's Market and Foreign Business*, 217-27 (1971); 3 *The Japan Interpreter*, Vol. 8, 353-73 (Autumn, 1973). Trading companies engage primarily in the purchase and resale of goods, and carry on their activities for the most part in import and export markets.

9. Sumitomo is an integrated trading company or "*sogo-shosha*", a uniquely Japanese institution. While there are thousands of trading companies in Japan, there are fewer than a dozen integrated trading companies or *sogo shoshas*. The latter group accounts for more than 50% of Japanese imports and exports. *See* Ballon and *The Japan Interpreter*, both cited above.

10. About 90% of the business of the major *sogo shosha* involves import and export trade concluded with Japan, i.e., imports from or exports to that country. Thus, it is imperative that the managers, executives and "traders" (a more appropriate term than "salesperson" for the functions performed by those who buy and sell goods for a *sogo shosha*) comprehend sophisticated questions of international finance, international investment, international trade, shipping and related business matters, as well as local and foreign potential market conditions for a wide variety of products—chemicals, fertilizers, steel products, machinery, industrial plants, textiles, airplane parts, rubber, raw materials, energy, ceramics, etc. It is equally imperative that such persons, whether working for the parent corporation or for its branches, representative offices or subsidiaries, intimately comprehend the Japanese marketplace and Japanese business practices, culture and language. Ballon, *supra; The Japanese Interpreter, supra.*

11. For the reasons set forth in Sumitomo's Brief submitted herewith, defendant Sumitomo respectfully requests that this Court dismiss the complaint herein.

/s/ J. PORTIS HICKS
J. Portis Hicks

Sworn to before me this
day of May, 1978

CONNIE STAVROS
Notary Public

CONNIE STAVROS
Notary Public, State of New York
No. 31-4611726
Qualified in New York County
Commission Expires March 30, 19[illegible]

Plaintiffs' Notice of Motion to Dismiss Counterclaim Pursuant to Rule 12(b) Dated May 18, 1978

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

NOTICE OF MOTION

S I R S :

PLEASE TAKE NOTICE that, upon the complaint and answer and counterclaim, the plaintiffs will move before the Honorable Charles H. Tenney on June 23, 1978 at 9:30 A.M., or as soon thereafter as counsel may be heard, at the United States Courthouse, Foley Square, New York, New York, to dismiss the counterclaim for failure to state a claim upon which relief may be granted and for lack of jurisdiction, pursuant to Rule 12(b), Federal Rules of Civil Procedure.

Dated: New York, New York
May 8, 1978

Yours, etc.,

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, N.Y. 10013
(212) 966-9620

By: /s/ LEWIS M. STEEL
Lewis M. Steel

To: WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Attention: John Schmelzer, Esq.
Appellate Section
2401 E Street, N.W.
Washington, D.C. 20506

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing motion to dismiss defendant's counterclaim and memorandum in support were forwarded this 5th day of May, 1978, via first class mail, postage prepaid, to the following:

WENDER, MURASE & WHITE
400 Park Avenue
New York, New York 10022

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Attention: John Schmelzer, Esq.
Appellate Section
2401 E Street, N.W.
Washington, D.C. 20506

/s/ LEWIS M. STEEL
Lewis M. Steel

First Amended Answer and Counterclaims of Defendant
Filed June 19, 1978

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER, ELIZABETH WONG,

On Behalf of Themselves And All Others Similarly Situated,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

FIRST AMENDED ANSWER AND COUNTERCLAIMS

Sumitomo Shoji America, Inc. ("Sumitomo"), by its attorneys, Wender, Murase & White, for its Answer to the Complaint, alleges as follows:

I

RESPONSES TO PLAINTIFFS' PLEADINGS

1. Except as hereinafter expressly admitted or denied, Sumitomo denies knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the Complaint.

2. Admits so much of paragraph 1 of the Complaint as alleges that plaintiffs purport to bring this action pursuant to the statutes and other provisions of law referred to therein, and denies any violation of said statutes or provisions of law.

3. Admits so much of Paragraph 2 of the Complaint as alleges that the persons named therein are females.

4. Admits the allegations of Paragraphs 4 and 5 of the Complaint.

5. Admits so much of Paragraph 6 of the Complaint as alleges that the five persons named therein are former employees of Sumitomo, and denies the remaining allegations of said paragraph 6.

6. Admits the allegations of Paragraph 7 of the Complaint.

7. Admits so much of Paragraph 8 of the Complaint as alleges that plaintiffs purport to bring this action as a class action, and denies the remaining allegations of said Paragraph 8.

8. Denies the allegations of Paragraph 9 of the Complaint.

9. Denies the allegations of Paragraphs 12 through 18, inclusive, of the Complaint.

10. Denies that plaintiffs are entitled to the relief prayed for or any part thereof.

II

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

11. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

12. This Court lacks jurisdiction over the subject matter of this action.

THIRD AFFIRMATIVE DEFENSE

13. Sumitomo's employment practices are proper and permissible and are sanctioned and privileged pursuant to the Treaty of Friendship, Commerce & Navigation between the United States and Japan, and applicable statutes, rules, regulations and practices.

FOURTH AFFIRMATIVE DEFENSE

14. Sumitomo's employment practices are proper, permissible and justified because they are founded upon and exist pursuant to bona fide occupational qualifications and business necessity.

FIFTH AFFIRMATIVE DEFENSE

15. All or portions of the plaintiffs' claims are barred by applicable statutes of limitations and unclean hands.

SIXTH AFFIRMATIVE DEFENSE

16. Plaintiffs lack standing to assert the claims made in the Complaint.

SEVENTH AFFIRMATIVE DEFENSE

17. The statutes and other provisions of law pursuant to which plaintiffs purport to bring this action do not provide the relief demanded in the Complaint.

AMENDED COUNTERCLAIMS

18. Jurisdiction of the within counterclaims is invoked pursuant to 28 U.S.C. §§ 1331 and 1343 and the doctrine of ancillary jurisdiction.

19. Upon information and belief, plaintiffs, on a date or dates unknown to defendant Sumitomo but prior to commencing certain proceedings referred to hereinafter, entered into a conspiracy to coerce Sumitomo to accede to plaintiffs' demands for assignment to work for which they were not quali-

fied, and for payment of additional compensation to which they were not entitled, and to retaliate against Sumitomo for its refusal to make such assignments or pay such additional compensation, by harassing Sumitomo and by injuring Sumitomo in its business and trade.

20. Upon information and belief, as part of carrying out their conspiracy, plaintiffs in bad faith, vexatiously, willfully and wrongfully commenced spurious and frivolous administrative proceedings before the Division of Human Rights of the Executive Department of the State of New York (the "Division of Human Rights"), and before the United States Equal Employment Opportunity Commission (the "EEOC"), making baseless claims in such proceedings that Sumitomo had discriminated against them. In the course of such proceedings, Sumitomo was subjected to interference with its person and property by the purported issuance against it by the EEOC of administrative subpoenae which were, upon information and belief, issued by the EEOC in violation of its own rules and regulations at the instance of and with the cooperation of plaintiffs, and as a result of which Sumitomo was required to spend substantial amounts of time and money responding thereto.

21. Both the proceedings before the Division of Human Rights and before the EEOC were terminated by such agencies with no action being taken and with no finding by either agency of reasonable or probable cause for the making of such claims by plaintiffs.

22. Upon information and belief, during the pendency of both of the aforesaid administrative proceedings plaintiffs interfered therewith for the purpose of preventing such proceedings from coming to determinations on the merits because plaintiffs were aware that such determinations would likely be adverse to them, and because in any event plaintiffs' purpose in bringing such proceedings was not to obtain a determination on the merits but instead was to coerce Sumitomo to accede to their demands for assignment to work for which they were not

qualified and for payment of additional compensation to which they were not entitled.

23. Upon information and belief, in furtherance of carrying out such conspiracy, plaintiffs also commenced the within action. The within action, upon information and belief, is brought by plaintiffs in bad faith and vexatiously, and is willfully and wrongfully brought for the purpose of coercing Sumitomo into acceding to plaintiffs' improper and unjustified demands concerning work assignments and additional compensation and in retaliation for Sumitomo's refusal to accede to such demands.

24. Upon information and belief, plaintiffs, also as part of and in furtherance of their wrongful conspiracy, have engaged in various other wrongful acts to disrupt the business of Sumitomo and injure it in its person and property, including by failing to perform their work properly, by engaging in acts of insubordination, by making divers misrepresentations about Sumitomo, by making attempts to induce other employees to breach their fiduciary duties to Sumitomo, by making efforts to purloin confidential documents and business records of Sumitomo, by coercing female employees not to accept promotions from Sumitomo during the pendency of this litigation, and by harassing and treating openly with scorn and contempt those employees who refused to accede to plaintiff's wrongful efforts thus to injure Sumitomo, all to the detriment and injury of Sumitomo.

25. As a result of the foregoing, defendant Sumitomo has been injured in its person and property and has accrued attorneys' fees and other costs. Further, by reason of plaintiffs' maintenance of the wrongful proceedings heretofore described, and this litigation, defendant Sumitomo has been injured in that it has been required to retain as employees one or more of the plaintiffs herein notwithstanding the fact that good and sufficient cause for their discharge exists, and has been required to give raises and other remuneration to one or more plaintiffs in excess of that to which they were properly entitled,

for fear that were Sumitomo to do otherwise it would be subject to charges of wrongful retaliation, notwithstanding the fact that any such action by Sumitomo should have been justified, proper and not retaliatory.

26. As a result of the foregoing, Sumitomo has sustained the following damages to date:

a) Attorneys' fees: $125,000

b) Retention of plaintiffs: $65,000

c) Lost personnel time and other incidental and/or consequential damages: $40,000

AS AND FOR A FIRST COUNTERCLAIM

27. Paragraphs 18 through 26 hereof are hereby incorporated by reference and repeated as though realleged in full.

28. Plaintiffs have instituted in bad faith, vexatiously willfully and wrongfully a spurious and frivolous Title VII action against defendant Sumitomo, knowing full well that such action has no basis in fact or law.

29. As a result of plaintiffs' wrongful conduct in commencing such spurious and frivolous Title VII action, defendant Sumitomo, pursuant to 42 U.S.C. § 2000(e)(5), is entitled to its attorneys' fees herein, and claims recovery against plaintiffs of attorneys' fees in the amount of $125,000 expended to date; and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

AS AND FOR A SECOND COUNTERCLAIM

30. Paragraphs 18 through 26 and 28 and 29 hereof are hereby incorporated by reference and repeated as though realleged in full.

31. Plaintiffs have instituted in bad faith, vexatiously, willfully and wrongfully a spurious and frivolous federal administrative proceeding and a spurious and frivolous federal civil action against defendant Sumitomo, knowing full well that

such proceeding and action had, and have, no basis in fact or law, for the purpose of coercing and harassing Sumitomo.

32. Plaintiffs have tortiously abused the federal administrative and judicial process.

33. As the result of the foregoing, defendant Sumitomo has been injured and claims $230,000 in damages to date, and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

AS AND FOR A THIRD COUNTERCLAIM

34. Paragraphs 18 through 26, 28 and 29 and 31 and 32 hereof are hereby incorporated by reference and repeated as though realleged in full.

35. Plaintiffs have instituted in bad faith, vexatiously, willfully and wrongfully spurious and frivolous federal and state administrative proceedings and a spurious and frivolous federal civil action against defendant Sumitomo, knowing full well that such proceedings and action had, and have, no basis in fact or law for the purpose of coercing and harassing Sumitomo.

36. Plaintiffs have deliberately and intentionally abused process under New York State Law.

37. As the result of the foregoing, defendant Sumitomo has been injured and claims $230,000 in damages to date, and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

AS AND FOR A FOURTH COUNTERCLAIM

38. Paragraphs 18 through 26, 28 and 29, 31 and 32 and 35, 36 and 37 hereof are hereby incorporated by reference and repeated as though realleged in full.

39. Plaintiffs have instituted in bad faith, vexatiously, willfully and wrongfully spurious and frivolous federal and state administrative proceedings and a spurious and frivolous fed-

eral civil action against defendant Sumitomo, knowing full well that such proceedings and action had, and have, no basis in fact or law, for the purpose of coercing and harassing Sumitomo and have acted otherwise to disrupt and injure the business and trade of Sumitomo.

40. Plaintiffs have deliberately and intentionally inflicted temporal economic harm upon defendant Sumitomo without privilege or justification.

41. As the result of the foregoing, Sumitomo has been injured and claims $230,000 in damages to date, and because plaintiffs' actions were willful and malicious, further prays punitive damages in the amount of $250,000.

WHEREFORE, defendant-counterclaimant Sumitomo Shoji America, Inc., prays judgment as follows:

(1) That the complaint herein be dismissed with prejudice;

(2) That it be awarded judgment on its first counterclaim in the amount of $125,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(3) That it be awarded judgment on its second counterclaim in the amount of $230,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(4) That it be awarded judgment on its third counterclaim in the amount of $230,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(5) That it be awarded judgment on its fourth counterclaim in the amount of $230,000 actual damages, plus $250,000 in punitive damages, jointly and severally against each of the plaintiffs named herein;

(6) That it be awarded the costs of this action, including reasonable attorney's fees; and

(7) That it be awarded such other and further relief as to this Court may seem just and proper.

WENDER, MURASE & WHITE

By /s/ J. PORTIS HICKS

(A Member of the Firm)
Attorneys for Defendant
Sumitomo Shoji America, Inc.
400 Park Avenue
New York, New York 10022
Tel: (212) 832-3333

Copy of Incoming Telegram, U.S. Embassy, Montevideo, Uruguay, to U.S. Department of State Dated November 8, 1949

DEPARTMENT OF STATE
INCOMING TELEGRAM

CONFIDENTIAL
[Comment: illegible stamp and handwriting placed on top of heading]

ACTION COPY

DIVISION OF
COMMUNICATIONS AND RECORDS
TELEGRAPH BRANCH

Control 3472

Rec'd November 8, 1949]
8:41 p.m.

[Comment: illegible stamp is placed over the above]

Action: ITP
Info:
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DCL
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DRC

FROM: Montevideo

TO: Secretary of State

NO: 385, November 8, 5 p.m. [Comment: "389" is typed, but crossed out and "385 is handwritten]

Foreign Minister has incorporated suggestion re modification FCN treaty (EMBTEL 374, October 28) in revised draft, which Embassy has seen and which is to be presented for discussion tomorrow. In general, Foreign Minister's suggestions less drastic than anticipated. Foreign Minister reportedly after consulting President and Administration-sponsored Presidential candidate, desires deletion Article III re military service and limitation of rights under Article XVII—3 and 4 of MFN. Elsewhere, concerning granting of both nationality and MFN rights, Foreign Minister wishes exclude least favorable. Itemization other specific proposals follows:

Article 5 (next to last line). Strike out "and technology"; substitute "technology and modern equipment".

Article VI—2, strike out subparagraph (A), (C) and (D). Article VI—1(A) insert "cultural" after "scientific".

Article VI—add what was formerly VI—2(D) as new subparagraph (D).

Article VI—2(B) retain as uninterrupted continuation of text.

Foreign Minister's proposal would give nationality treatment to entire content Article VI—1 and 2, except for mineral rights. Embassy sees no objection unless Department, for technical reasons, unable grant similar treatment.

Article VI—4

CONFIDENTIAL [Comment: stamp reading Filed Nov 15 19(illegible)]

[Comment: 2 illegible stamps with handwriting appear on left margin of page; stamp with numbers 711.332/11-849 appears on right margin]

[End of page]

CONFIDENTIAL

Article VI—4 (first sentence) after "nationality" add "on condition that in the selection of the persons referred to,

discrimination against nationals of the other party shall be avoided, and without prejudice to laws designed to protect their employment." Embassy recognizes this amendment would seriously weaken rights which this paragraph seeks to safeguard, and proposes resist acceptance.

Article VIII—4(A), strike out "and most favored nation". Reverse positions of subparagraphs (A) and (B).

Article IX—1(A), strike out. Embassy believes Foreign Minister has not clearly understood meaning this paragraph and will try explain to his satisfaction.

Article X—2, Foreign Minister prefers translate following portion, "in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than these reasonably allocable or apportionable to its territories," into Spanish as, "en exceso de lo que corresponda a los negocios que se realicon en sus territorios, ni concederal deducciones y exenciones menores que las que razonablemente se debau conceder con relacion a los mismes".

Embassy believes that if above Spanish text acceptable, change in English unnecessary.

Article XIII—1 (second sentence). After "sanitation", add "for the protection of the balance of payments". Embassy proposes explain Uruguay already protected by Article XIV—2 of IMF agreement.

Article XV—1(A). After "availability" add "of merchandise and means of payment". If Uruguayans insist, Embassy proposes yield this point since availability foreign exchange is commercial consideration and use accumulated balances guaranteed in Protocol 6.

Foreign Minister stated late today Uruguay will propose no further changes.

[Typewritten name illegible]

JSP:RWP

CONFIDENTIAL

Copy of Outgoing Telegram, U.S. Department of State to U.S. Embassy, Montevideo, Uruguay Dated November 10, 1949

DEPARTMENT OF STATE

CONFIDENTIAL
Classification

Control 3100
NOV 10, 1949
For DC/T Use Only

AMEMBASSY,

MONTEVIDEO.
262

FCN Treaty. Reopening by URUG NEGOTS on provisions previously accepted by them disturbing. URTELS 385 NOV 8; 387 NOV 9. Difficult understand value proposed changes from standpoint URUG interests. DEPT has on several occasions made concessions in belief NEGOT CLD be concluded, only to be confronted with demands for additional changes. Is there any assurance present proposals represent final position URUG GOVT? As counter negotiating tactic, WLD it be helpful for EMB reopen questions on which compromise reached with Gonzalez, or re-propose provisions previously rejected; e.g., those referred to second PARA DEPT A-231 OCT 17 and second PARA DEPTEL 193 AUG. 5. Also ART II(1) and IX(1,2), although accepted by DEPT as amended by Gonzalez, are not entirely satisfactory, and DEPT's original draft preferable. Since NEGOT began, DEPT has developed additional provisions that might be introduced at this time.

Re XVII(3,4), DEPT's position remains as in DEPTEL 250 OCT 29. Although number other proposed changes appear of no substantive importance, others may create serious difficul-

ties. Proposals re VI(4) and Add. Protocol definitely in latter category. Revised translation

[Comment: Illegible handwriting appears on left and right margins of page and numbers 711.332/11-949 are stamped on right margin]

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Classification

[End of page]

DEPARTMENT OF STATE
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portion ART X(2) introduces substantive change and is unacceptable. EMB SHLD obtain explanation URUG objective so DEPT can consult TREAS expert re possible change English text. INSTRS on certain other details possibly ready early next week; others will require longer study.

/s/ WEBB

WEBB (Acting)

[Comment: illegible initials]

ITP:CP:VGSetser:lhj CTP OFD EC L/T L/E
November 10, 1949 (Cleared with Oakley)

[Comment: Illegible handwriting and dates appear next to typed letters above]

[illegible stamp] CONFIDENTIAL
Classification

Letter of Lee R. Marks, Deputy Legal Adviser, U.S. Department of State to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission Dated October 17, 1978

DEPARTMENT OF STATE

Washington, D.C. 20520

[SEAL]

October 17, 1978

Abner W. Sibal
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Sibal:

This responds to your June 9, 1978 letter to Mr. Hansell about the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan (the FCN Treaty). Your letter asks for our views on four questions; the questions and our views are set forth below.

1. *Does the treaty permit subsidiaries of Japanese companies which are organized under the laws of a state of the United States to fill all its top management positions with Japanese nationals admitted as treaty traders? Would it be inconsistent with the terms of the treaty to rule that even top management positions are subject to Title VII of the Civil Rights Act of 1964 prohibiting discrimination on the basis of race, sex or national origin?*

Article VIII(1) of the FCN Treaty gives nationals and companies of each Party the right to employ, in the territory of the other, "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." This provision was intended to ensure that U.S. companies operating in Japan could hire U.S. personnel for critical

positions, and vice versa. The phrase "of their choice" should be interpreted to give effect to this intention, and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders. We express no opinion on what positions would, in a particular case, qualify as "executive personnel."

We do not believe the phrase "of their choice" should be read as insulating the employment practices of foreign companies from all local laws. For example, the Treaty does not in our view confer any right to hire in violation of child labor laws, nor does it require the Department to issue a treaty trader visa to persons otherwise ineligible to enter the United States under the Immigration and Nationality Act. Similarly, we do not believe that it confers any right to discriminate against a particular sex, religious, or minority group.* The right granted by the Japanese FCN Treaty to Japanese enterprises operating in the United States is simply the right to fill certain positions with Japanese nationals; American companies operating in Japan enjoy the equivalent right.

2. *Is the situation different if the company doing business in the United States is not incorporated in the United States?*

Article VIII is addressed to "nationals and companies of either Party . . . within the territories of the other Party." Article XXIII defines "companies" as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." In determining the scope of Article VIII, we see no grounds for

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* Both the Japanese and United States Governments have subscribed to a number of international declarations calling on multinational enterprises to respect human rights and avoid discrimination. See point 7 of the 1976 OECD Guidelines for Multi-national Enterprises and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. These are not binding, but they reinforce our view that Article VIII should not be read as conferring a license to discriminate.

distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form.

3. *What criteria are used by the Department of State in determining what positions are within the scope of the treaty when it issues non-immigrant visas to treaty traders?*

The criteria derive from section 101(a) (15) (E) (i) of the Immigration and Nationality Act of 1952, as amended, and 22 C.F.R. § 41.40 *et. seq.* In addition to the statute and regulations (which do not define "executive personnel"), consular officers have access to the Advisory Opinions of the State Department's Visa Office (special guidance to U.S. consular officers upon request); the Administrative Decisions Under the Immigration and Nationality Laws of the United States by the Board of Immigration Appeals of the INS; and judicial decisions rendered upon appeals from the rulings of the INS.

The Department of State, through its consular officers in American embassies and under limited circumstances its Visa Office in the United States, and the Immigration and Naturalization Service in the case of change of visa requests, determines on an individual basis whether an applicant is entitled to a non-immigrant visa as a treaty trader. In making this determination, both the qualifications of the applicant and proposed position of employment are examined.

In granting a non-immigrant treaty trader visa, the Department (or INS) thus makes an administrative determination that a visa applicant will fill an "executive personnel" position, but this determination is made for the limited purpose of administering the visa laws. We do not believe that the determination should preclude judicial review of the scope of the term "executive personnel" for other purposes, including the application of Title VII.

4. *Is any supervision exercised to determine if persons admitted as treaty traders do in fact operate in the type of position for which they were admitted? What sanctions are imposed if violations are found?*

Under the terms of their visas, treaty traders must file annual reports with the INS to show that they are maintaining their treaty trader status. If, on the basis of information furnished in an annual report, the INS determines after investigation that an alien no longer qualifies as a treaty trader, the INS is authorized to order the alien to leave the country, and, if necessary, to deport the alien (8 U.S.C. Section 1257(9); 8 C.F.R. Sections 241.2 and 241.9). During the course of a nonimmigrant's stay in the United States, the INS also has authority to monitor the alien's employment to insure that it complies with the terms of the alien's visas. Private parties may trigger such an INS investigation by lodging a complaint with the district INS office.

If you have any further questions or if we can provide further help, please let us know.

Sincerely,

/s/ LEE R. MARKS
Lee R. Marks
Deputy Legal Adviser

Cover Letter from Lutz Alexander Prager, Assistant General Counsel, Equal Employment Opportunity Commission to Lewis Steel, Esq., Dated December 14, 1978, With Enclosure from Department of State (March 15, 1978 Letter of Diane Wood, Attorney Adviser, U.S. Department of State)

RECEIVED Dec. 19, 1978

[SEAL]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20506

December 14, 1978

Lewis Steel, Esq.
Eisner, Levy, Steel and
Bellman
351 Broadway
New York, New York 10013

Dear Mr. Steel:

As you requested, I enclose a copy of the State Department's March 15, 1978, letter to the Commission concerning the relationship between Title VII and the 1953 United States-Japanese Treaty of Friendship, Commerce and Navigation.

Very truly yours,

/s/ LUTZ ALEXANDER PRAGER
Lutz Alexander Prager

[SEAL]

DEPARTMENT OF STATE

Washington, D.C. 20520

March 15, 1978

Mr. Earl Harper, Jr.
Assistant General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Harper:

I have been asked to reply to your letter of December 21, 1977, to the Department of State requesting its views on the jurisdiction of the Equal Employment Opportunity Commission (EEOC) to investigate and process claims of discrimination relating to "treaty trader" positions. The specific question is whether the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan (the FCN Treaty) should be interpreted to preclude EEOC jurisdiction in a case involving allegations of national origin discrimination in hiring for such positions.

For the reasons stated below, it is our opinion that the FCN Treaty does not divest the EEOC of jurisdiction.

The Civil Rights Act of 1964, as amended, gives the Commission beoad [sic] jurisdiction to investigate any charge filed by a person "claiming to be aggrieved, . . . alleging that an employer ployer has engaged in an unlawful employment practice." Sec. 706(b), 42 U.S.C. § 2000e-5(b). Sumitomo Shoji America, Inc. (Sumitomo), a U.S. corporation, is an "employer" within the meaning of section 701(b), of the Act, and the employee positions involved fall within the meaning of section 701(f). Unlawful employment practices are defined in section 703(a), and they include, *inter alia,* the failure or refusal to hire an individual because of his or her "race, color, religion, sex, or national origin."

Unless the Treaty somehow changes things for purposes of jurisdiction over the subject matter, jurisdiction exists if the charging party claims national origin discrimination and satisfies the other jurisdictional prerequisites, such as the 180 day filing period. The charging parties in this case have done so, as we understand the facts. Since the Civil Rights Act is silent as to the relationship between its provisions and those of the FCN Treaty, it is necessary to read the Treaty with the Act, and see if the two can be reconciled.

The mere fact that Article VIII(1) of the FCN Treaty gives employers the right to employ persons "of their choice" does not mean that the class of employers composed of subsidiaries of foreign companies protected by FCN Treaties is exempt from general U.S. law. In fact, Article I of the FCN Treaty with Japan is the article that provides the general authorization for issuance of "E-1" visas to Japanese treaty traders. However, even assuming Article VIII(1)'s language is fully applicable to treaty traders, our conclusion is the same. *Every employer in the United States has the right to employ the persons of his choice, but that does not mean that he is free to engage in unlawful practices, such as discrimination or unfair labor practices.* The right granted by Treaty to subsidiaries of Japanese companies doing business in the United States is simply the right to employ Japanese persons on the same basis as American nationals. The treaty trader immigration laws and rules implement this objective by permitting entry of Japanese "treaty traders" through procedures far less burdensome that the normal procedures for non-treaty trader aliens seeking to enter the United States for purposes of employment.

Neither the Civil Rights Act nor the regulations issue under the Act contain any specific exemption for "treaty trader" positions. Moreover, the Act's legislative history is also silent. The Act expresses the firm policy of the United States against all forms of discrimination and the FCN Treaty's language does not compel a finding of exemption for "treaty traders." Therefore, we believe that the Commission does have jurisdiction in this case.

Concluding that the Commission has jurisdiction, however, does not dispose of the various issues raised in [words obliterated by interlineation] letter to the Commission concerning the merits of the claim, such as whether the charging parties have alleged national origin discrimination or merely citizenship discrimination, whether "treaty traders" somehow qualify for an exception similar to the job-related exception, and whether "treaty traders" are entitled to any benefits at all beyond the procedural benefits spelled out in the immigration laws.

We would be happy to provide the Commission with our views on these questions if the investigation proceeds.

I hope that you find these comments useful. If you have any questions, or wish to discuss anything in this letter, feel free to call me, at 632-0349, or Victor Vilaplana, at 632-2149.

Sincerely,

/s/ DIANE WOOD
Diane Wood
Attorney Adviser

[Comment: various parts of the above letter have been underlined in handwriting]

Affidavit of Lance Gotthoffer Submitted in Support of Defendant's Motion for Reconsideration, Sworn to September 10, 1979 With Exhibits Attached

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

AFFIDAVIT

State of New York)
ss.:
County of New York)

LANCE GOTTHOFFER, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Wender, Murase & White, counsel for defendant Sumitomo Shoji America, Inc., ("Sumitomo"). I make this affidavit in support of Sumitomo's motion for reconsideration of this Court's Opinion and Order dated June 5, 1979 to the extent that it denies Sumitomo's motion for an order dismissing the complaint herein.

2. This motion is based upon newly discovered evidence—certain heretofore unavailable documents only recently made available to the parties by the United States Department of State. This affidavit is submitted to resolve now, at the outset, any possible question as to authenticity.

3. On August 15, 1979, I received in hand from George Lehner, Esq., an attorney advisor in the office of the Legal Advisor, Department of State, Washington, D.C., documents which Mr. Lehner represented to me were true copies of documents from the files of the United States Department of State where such documents were kept. I attach hereto true copies of all the documents given to me by Mr. Lehner, and represented by him to be authentic State Department documents as described above. For the convenience of the Court, an index to the documents is also attached.

4. In light of the foregoing, defendant respectfully submits that these documents have been sufficiently authenticated, and that absent any showing by plaintiffs on this motion that further authentication is required, such documents should be for all purposes in this case, considered duly authentic as required by law.

/s/ LANCE GOTTHOFFER
Lance Gotthoffer

Sworn to before me this
10th day of September, 1979

/s/ DOUGLAS J. DANZIG

Douglas J. Danzig
Notary Public, State of New York
No. 60-4607413
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1981

(INDEX TO AFFIDAVIT OF L. GOTTHOFFER)

1. Communication of Department of State to United States Political Adviser for Japan, Tokyo, marked "RESTRICTED No. 63", stamped Nov. 1, 1951, and Annex thereto.

2. Foreign Service Despatch No. 915, from USPOLAD, Tokyo, to Department of State, re FCN Treaty with Japan, dated December 17, 1951.

3. Outgoing Airgram No. A-453, from Department of State (Acheson) to USPOLAD, Tokyo, re FCN Treaty with Japan and Despatch No. 915, dated January 7, 1952.

4. Despatch No. 13, by Office of United States Political Adviser for Japan, Tokyo, re Japanese FCN Treaty, dated April 8, 1952.

5. Outgoing Airgram No. A-49, from Department of State (Acheson), to American Embassy, Tokyo, re Japanese FCN Treaty, dated July 23, 1952.

6. Telegram No. 3989 from American Embassy, Tokyo, to Secretary of State, dated March 28, 1975.

7. Telegram No. 11177 from American Embassy, Tokyo, to Secretary of State, dated August 13, 1975.

8. Department of State Airgram No. A-105 (Kissinger) to American Embassy, Tokyo, dated January 9, 1976.

9. Department of State Instruction, No. A-852, to HICOG, Bonn, re FCN Treaty with Germany, dated January 21, 1954.

10. Foreign Service Despatch No. 2413, from HICOG, Bonn, to Department of State, re FCN Treaty with Germany, dated March 8, 1954.

11. Foreign Service Despatch No. 2529, from HICOG, Bonn, to Department of State, re FCN Treaty with Germany, dated March 18, 1954.

12. Letter of April 29, 1954, from Office of United States High Commissioner for Germany, to Secretary of State, and enclosures, consisting of 16 Notes from the Office of the United States High Commissioner for Germany to the German Ministry of Foreign Affairs re the FCN Treaty with Germany, dated November 2, 1953, November 4, 1953 (1st note); November 4, 1953 (2nd note); November 5, 1953; November 12, 1953; November 23, 1953; December 9, 1953; December 10, 1953; December 12, 1953; December 14, 1953; December 15, 1953; December 16, 1953 (1st note); December 16, 1953 (2nd note); February 5, 1954; February 8, 1954; February 9, 1954.

13. Letter of the Trade Agreements and Treaties Division to the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, dated September 16, 1955.

14. Letter of the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, to the Commercial Policy Staff, Department of State, dated September 28, 1955.

15. Letter of the Trade Agreements and Treaty Division, Department of State, to the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, dated October 28, 1955.

16. Letter of the Netherlands negotiator to the Counselor for the U.S. Embassy for Economic Affairs, The Hague, dated October 22, 1955.

17. Letter of the Netherlands negotiator to the Economic Counselor of the U.S. Embassy, The Hague, dated October 6, 1955.

18. Letter of the Trade Agreements and Treaty Division, Department of State, to the Counselor for Economic Affairs, American Embassy, The Hague, Netherlands, dated November 8, 1955.

19. Letter of the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, to the Commercial Policy Staff, Department of State, dated November 4, 1955.

20. Letter of the Netherlands negotiator to the Economic Counselor, U.S. Embassy, The Hague, dated November 8, 1955.

21. Letter of the Counselor of Embassy for Economic Affairs, American Embassy, The Hague, Netherlands, to the Trade Agreements Division, Department of State, dated November 14, 1955.

Exhibit 1

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RESTRICTED

No. [Comment: Number "63" handwritten]

[Comment: Numbers "611.944/6-1651" handwritten]

[Comments: Numbers "611.944/6-1651" stamped on right side of letter as well as handwritten. Letters "CS/R" also stamped on right side. File stamp, which is initialled, appears on lower left side of letter].

To the [blank]
United States Political Adviser for Japan,
Tokyo.

The Secretary of State refers to the Mission's Despatch 246 of August 16, 1951, with enclosures, regarding the development of a negotiation between the United States and Japan for a new treaty of friendship, commerce and navigation. This Government shares the desire expressed by the Japanese, and as set forth in Article 12 of the Peace Treaty, to proceed expeditiously with discussions of such a treaty, with a view to arriving at a mutually agreed text which may be ready for signature as soon after the formal restoration of peace as may be possible. The fact that the Japanese Government has seen fit to pattern its tentative treaty draft upon the model afforded by treaties of the type which the United States has lately entered into with other countries suggests that there is general agreement on the nature, scope and content of a treaty of sufficient extent to augur well for the success of a negotiation.

Ordinarily, the Department prefers to use, and has used in all negotiations to date (except in the special case of Ethiopia), its own "standard" model as a basis for negotiating a treaty of friendship, commerce and navigation. This draft has the advantage, inter alia, of being a document which the Senate has pre-

viously approved and with which it is now familiar. Six mimeographed copies thereof are enclosed. Copies of this draft should be furnished to the Japanese for their study, and as the latest illustration of the Department's views and preferences as to the most suitable approach. However, although the Department would be happy if the Japanese Government should be willing to substitute the Department's standard draft for its own initial proposals as a basis for discussion, the Department will refrain from insisting that this be done. If the Japanese strongly desire, the Department is willing, in deference to the Japanese initiative and as a token of good will, to use the Japanese draft, with certain amendments, as the starting point for developing the negotiation. These amendments are set forth in the Annex hereto.

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In the present instruction and its Annex, the Department has confined itself to setting forth certain basic considerations that affect the formulation, in major outline, of what it would regard as an appropriate basis for treaty discussions. Comments on the details of, and proposals for secondary modifications in, the various provisions of the Japanese draft, are deferred until after a basic negotiating draft is definitely ready and the two Governments are thereupon in a position to commence detailed discussion. (As to the Japanese indication of desire to negotiate also with respect to tariff concessions, consular rights, shipwrecks and double taxation, the Japanese correctly appreciate that these matters are properly treated separately from our FCN Treaty).

The Department is mindful that the Japanese draft proposals forwarded under cover of the despatch in reference, and which constitute the object of the comments in the present instruction, are tentative and that the Japanese expect to give further study

and consideration to perfecting their ideas of the kind of treaty they would like to negotiate. The Department hopes that with the information contained in the present instruction and its enclosures, the Japanese will be able within the reasonably near future to prepare, or assent to, a definitive negotiating draft which will be satisfactory to both Governments as the starting point of detailed discussions. It is understood that the acceptance, as basis for discussion, of the Department's standard draft, or of the Japanese draft amended in the manner suggested in the Annex to the present instruction, will not prejudice the position of the Japanese or of the United States as to the final text of the treaty, nor will it prejudice the right of either to seek such modifications and amendments as it may wish during the course of negotiation.

There are enclosed, in addition to six copies of the Department's standard draft, three copies each of treaties of friendship, commerce and navigation most recently signed by the United States, namely: Greece (August 3, 1951), Israel (August 23, 1951) and Denmark (October 1, 1951), plus the Supplementary Agreement with Italy (September 27, 1951). These treaties, like those with Colombia, Ireland, Uruguay and Italy previously signed and supplied to the Mission and interested Japanese officials, were all developed from the Department's standard proposals of the day. While reflecting many variations and adaptations to the views and special circumstances of the different countries, they all embody the same common denominator of treaty principle and coverage. Copies of all of this material should be furnished to the appropriate Japanese officials, along with comments on their draft along the lines set forth in the Annex to the present instruction.

The Department will await with interest the Mission's report on the reactions of the Japanese Government to the views set forth herein. If the Japanese Government is prepared to accept as a basic negotiating draft the Department's standard draft, or, alternatively, its own draft with revisions corresponding generally to those suggested by the Department, the Department is prepared, as stated in the Department's telegram No. 621 of October 17, to undertake negotiations at an early date with a view to

agreement on a final document. The Department is further prepared to give full

consideration

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consideration to the preference of the Japanese Government for either Tokyo or Washington as the site of negotiations.

The Department's comments on the views of the American Chamber of Commerce on a treaty of friendship, commerce and navigation between the United States and Japan (the Mission's despatch No. 440 of September 19) will be submitted shortly.

Enclosures:

1. Six copies of FCN Treaty (in blank).
2. Three copies of FCN Treaty with Greece.
3. Three copies of FCN Treaty with Israel.
4. Three copies of FCN Treaty with Denmark.
5. Three copies of Supplementary Agreement with Italy.

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EET:CP:HWalker:jn
October 22, 1951

L/E L/T SD BPT Cleared in draft;
OFD—Mr. Young 10/15/51
Commerce—Miss Espenshade 10/1
NA—Mrs. Kallis 10/19/51

RESTRICTED

[Comment: Various illegible initials appear on lower part of page along with file stamp dated Oct 26 1951 and Nov 1 1951 at bottom of page.]

ANNEX

Amendments to the draft treaty of friendship, commerce and navigation which was forwarded under cover of Mission despatch 246 of August 16.

In the main, the Japanese draft is in general outline sufficiently close to United States ideas to be an adequate basis for commencing the process of arriving at a mutually agreed final text. In some respects, however, the Japanese draft would need to be amended, if it is so to be used. Such amendments fall into three classes, as described below.

The first type of amendment is of a stylistic order, and is merely desirable rather than essential. It is proposed to substitute the term "companies" for "corporations and associations" wherever used; the simple terms "national treatment" and "most-favored-nation treatment", respectively, with definitions thereof in the definitions Article, for the more lenghy [sic] references to these concepts throughout the treaty; and the term "products" for the expression "articles the growth, produce or manufacture". These devices, used in all United States treaties signed subsequent to that with Italy, save a considerable amount of wordage and contribute to concise sentence structure.

The second group of amendments would be the addition, at appropriate points, of several provisions found in most of the recent United States treaties which are missing from the Japanese draft. These include, notably, the following, the texts of which may be found in the enclosed standard draft at the points indicated in parentheses: provision on commercial arbitration (Article V, paragraph 2); rule concerning the treatment of private enterprises which are under competition from state enterprises (Article XVIII, paragraph 2); paragraph on the employment of technical personnel (Article VIII, paragraph 1); paragraph regarding the national treatment of corporations in the United States, in consequence of the nature of the federal system (Article XXII, paragraph 4); provision regarding the impairment

of vested rights and interests (Article VI, paragraph 4); and reservations with respect to fissionable materials, United States territorial preferences, and the GATT (Article XXI, paragraphs 1 (d), 2 and 3). Should there be special problems with respect to the GATT in the case of Japan, they can be dealt with during negotiation. Paragraph 4 of Article XXI of the United States draft is also necessary. (It may further be noted that the Department has under consideration the adding of new material to its industrial property article, designed to encourage technological interchanges. Should such a proposal be formulated, it will be presented later.)

The third group of amendments consists of several Articles from the Department's standard draft to be substituted in texto for certain Articles of the Japanese draft which diverge so widely from what the Department considers appropriate formulations as to be unsuitable bases for discussion. The substitutions accordingly proposed below are, of course, without prejudice to changes in other provisions in the Japanese version which the Department will wish to introduce during the course of the discussions. Further Japanese study of current United States treaty policy may, indeed, lead the Japanese on their own motion to introduce appropriate secondary revisions in some of their

[Comment: Handwritten on right of page are illegible letters plus "611.944/6-1651".]

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proposals in advance of the opening of detailed discussions.

Article I of the Japanese draft should be replaced by Article II, paragraphs 1 and 3, of the Department's standard draft. It is not possible for the Department to use a treaty of this kind as a vehicle for a wholesale setting aside of United States immigration policy. National treatment is, of course, out of the question; and, since immigrant quotas vary widely from country to country, it is not possible to assure even most-favored-nation treatment to any country as a general proposition. It is, however, possible to stipu-

late most-favored-nation treatment for one special category of entrants, namely, those entering for the purpose of engaging in international trade (i.e., "treaty traders") and who are covered in sub-paragraph (a) of the Department's draft. (The formulation on this subject in the treaty with Ireland, for example, is in most-favored-nation terms). Also, the Department would wish to substitute paragraph 2(d) and (e), of the same Article of its draft, for Article IV, paragraph 3, of the Japanese draft, because the national treatment proviso of the latter gravely weakens a sound rule on freedom of communication and of reporting.

The Mission is undoubtedly aware that there has been pending in Congress a proposal, patterned after Acts already passed in behalf of the Chinese, Filipinos and others, to remove the existing racial bar to the immigration and naturalization of Japanese. The enactment of this proposal, which is now being considered in connection with a comprehensive revision and recodification of the immigration code, would remove not only the feature of United States immigration policy which the Japanese have found peculiarly objectionable but also the particular disabilities in the land laws of Western states which are in terms of aliens ineligible to citizenship.

Article V should be replaced by Article IX of the Department's standard draft. Interference by treaty with State prerogatives in the control of land policies has historically been a subject of great delicacy. On at least two occasions in the past the Senate has rejected treaties with Western European powers that provided national treatment as to land ownership; and it will be noted that none of the recent treaties signed by the United States (China, Italy, Uruguay, Ireland, Colombia, Greece, Israel, Ethiopia and Denmark) attempts to prescribe State policies with respect to ownership of real property.

On the other hand, it has been acceptable to provide national treatment with respect to the leasing of real property necessary to the conduct of treaty activities, notwithstanding some State laws circumscribing alien leaseholds. The right to lease is a valuable treaty right in the United States, as was demonstrated in the case

of the 1911 treaty of commerce and navigation with Japan. The Department, in proposing the formulation in the United States standard draft, is offering to assure leasehold rights.

With respect to ownership rights, the Department is proposing to deal in a special way: namely, through the "de facto reciprocity" formula first broached in the treaty of 1937 with Siam. This formula, devised in an effort to approach the national treatment ideal as nearly as practicable, provides in effect for reciprocal national treatment on ownership to the extent that the State laws

permit;

[End of page]

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permit but it envisages that Japan would be free to withhold this standard of treatment from citizens and corporations of States that do not accord national treatment to Japanese nationals and corporations. A like formula in the 1946 Treaty with China is said to have influenced the States of Nevada and Utah toward ameliorating the Chinese disabilities of their real property laws; and the adoption of the formula in treaties with Japan and other countries would undoubtedly be of pertinence to the reconsideration, now variously evident in the United States, of alien land disabilities still persisting in certain State laws. Expressly anti-Oriental laws have been declared unconstitutional in Arkansas, Oregon and in the lower courts of California; and are understood to have been liberalized by legislative action in Utah and Nevada. In half the States, aliens at present enjoy the same rights as citizens with respect to landholding; and in only a comparatively few States are the disabilities against the generality of aliens of serious proportions insofar as commercial property is concerned.

As to Articles III and VI, attention is invited to Articles VII and VIII of the Department's standard draft, as an improved and definitely preferable approach to the framing of sound rules on the business activities of persons and corporations. It will be

noted that the second paragraph of the latter deals with a subject apparently missing from the Japanese draft, but which the Department did not include in the list, given above, of provisions which it proposes be added to the Japanese draft. For other illustrations of treaty drafting deemed to be an improvement over the China and Italy treaties, see Articles VII and VIII of the Colombia Treaty and Articles XII and XIII of the Greek Treaty. The later formulation of the standard draft (upon which the Israel Treaty is incidentally, based), it may be emphasized, is considered to be superior to these.

Article IX. It is requested that the Japanese withdraw this Article altogether. It is no longer the policy of the United States to enter into treaty undertakings to grant exemptions from military service; and treaties most recently negotiated (Uruguay, Colombia, Greece, Israel, Ethiopia and Denmark) therefore contain no military service provisions. The necessity of maintaining this policy in future negotiations is underscored by action Congress took this summer in amending the Selective Service Act so as to make aliens entered for permanent residence henceforth subject to the draft.

Articles XI through XVII. Since the negotiation of the treaty with Italy, the Department has concluded that all essential provisions on navigation can be compressed into the confines of a single Article. (See Article XIX of the Department's standard). The abbreviated formulation now favored by the Department has, aside from the virtue of compactness, the advantage of closing loopholes that might be present in the longer formulation of the Italy Treaty, through application of the inclusio unius exclusio alterius maxim. Substitution of the Department's standard navigation article is therefore requested. It may be noted that material of the sort treated in Article XIV of the Japanese draft is not included in the Department's draft. The formulation of an acceptable treaty rule on this would require some exploration. (Note: the only provision in this connection to which the Department has thus far agreed in any recent commercial treaty negotia-

tion is Article XXII, paragraph [Comment: handwritten paragraph "3" written in], of the Treaty with Greece).

Article

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Article XXII. Since the negotiation of the treaty with Italy in 1948, on which the Japanese proposal is presumably based, the Department has restudied the whole question of exchange controls, with a view to the formulation of improved rules, especially as the interests of investors are affected. This reformulation, as reflected in Article XII of the Department's standard draft, should be substituted for the Japanese proposal. It may be noted that the major deficiencies of the exchange control article of the 1948 Italian Treaty have now been corrected in a Supplementary Agreement with Italy, signed September 27 of this year (see Article III and IV of same).

Article XXIV. This Article creates difficulties. An agreement in which tariff concessions are made (e.g., a trade agreement) is a more suitable vehicle for this sort of thing than is a treaty of the present sort. The establishment of a general valuation policy, moreover, is more properly the function of a multilateral than a bilateral negotiation. Finally, Congress has indicated opposition to the abandonment of the so-called "American selling price" feature of the United States Customs Law. (Note. The valuation rules set forth in the GATT are only provisional, and are applicable only to the extent that the legislation of each contracting party permits).

Article XXVII. The Department proposes that this Article be deleted, and that in lieu thereof there be inserted in the Protocol a provision tentatively worded as follows:

> "With reference to (Article XXXI, paragraph 1 (7)), it is understood that either High Contracting Party may prohibit the importation into its territory or seize, in accordance with the law of such High Contracting Party, any goods of the other High Contracting Party which bear, through labelling, marking, or otherwise, a false indication

of geographic or commercial origin or which produce a false impression of their true origin. Each High Contracting Party agrees to take appropriate steps to prevent unfair practices involving false indications, of whatever nature, that goods produced or sold in or exported from the territory of such High Contracting Party originate within the territory of the other High Contracting Party or any distinctive place within such territory or are the product of a national of such other High Contracting Party."

The reason for suggesting a Protocol position is that clause (a) of the Japanese Article XXVII (the first sentence of Department's redraft) is already covered in the general language of paragraph 1(7) of Article XXXI of the Japanese draft, and is a specific illustration of the deceptive and unfair practices alluded to therein. The technique suggested obviates possible duplication in the text of the treaty. Another reason for handling the matter in the manner proposed is that the assertion of the right in question, although quite desirable for purposes of emphasis, is strictly speaking superfluous, inasmuch as each Party has this right whether or not the treaty so states.

The second sentence of the Department's counterdraft is a restatement of clause (b), and following, of the Japanese proposal, in what is deemed to be clearer and more meaningful language. It furthermore

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furthermore orients the provision away from the subject of alleged abusive use of what is often known as "distinctive regional and geographical appellations of origin"—e.g., the label "Port" or "Champagne" on vinous beverages not produced in the official Port and Champagne regions of Portugal and France. It is not known that Japan has any name-products of this sort of which she is jealous; and the United States would not wish to undertake to make its own regulations more severe than at pre-

sent, inasmuch as present regulations do in fact prevent the use of such names in a manner calculated actually to deceive the customer as to the true nature and origin of the product, and the United States has been unable to agree with the very restrictive views on the matter nurtured by some foreign governments.

Article XXX. While this Article is not necessarily objectionable, the Department does not perceive any particular need for its inclusion.

Article XXXII. The Department proposes that this Article should be replaced by Article XXIV of its standard draft which, it will be noted, contains a paragraph on consultation as well as one on the ultimate submission of unresolved disputes to the International Court at the Hague. The development of the standard submission clause, which has been included with Senate approval and without significant alteration in each of the nine treaties of the present sort signed by the United States since World War II, is regarded by the Department as an outstanding achievement of its current treaty program; and its inclusion is the clearest kind of indication that the treaty establishes a rule of law.

The Japanese proposal on this score appears to be ambiguous and inconclusive. The objective of a submission, or "compromissory", clause is to provide definitely for the settlement of a dispute. This the Department's formulation does, in the most straightforward manner, by simply saying that any dispute not otherwise settled may be taken to the Court. This ultimate step would presumably be resorted to, in actual practice, only very rarely. The Department's formulation is framed with a view to achieving harmonization of differences of opinions about the treaty before differences emerge into real disputes; is designed to give the greatest encouragement to resolving differences by ordinary diplomatic procedures; and allows every leeway to the two countries to refer any particular dispute to arbitration, or other forum, as they might mutually desire.

[Comment: Note that in last paragraph of the original, the first letter, or first two letters, of the first word in a line are cut from left portion of page].

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Exhibit 2

AIR PRIORITY / PRIORITY	RESTRICTED Security Information *(Security Classification)*	DO NOT TYPE IN THIS SPACE 611.944/12-1751

[Comment: Illegible initials appear in upper right of page]

FOREIGN SERVICE DESPATCH

FROM : USPOLAD, Tokyo 915 (Desp. No.)

TO : THE DEPARTMENT OF STATE, WASHINGTON

December 17, 1951 (DATE)

REF : Misdes 871, December 7, 1951

4 For Dept. Use Only bs	ACTION FE REC'D DEC 22	I N F O	DEPT. REP DCR OLI E L / OTHER COMM TAR TR

SUBJECT : FCN Treaty with Japan

Further exploratory talks have been held with officials of the Ministry of Foreign Affairs in connection with the Department's standard draft for an FCN Treaty. In addition to the points raised regarding the preamble and first five articles of the standard draft—as reported in the despatch under reference—the Ministry's representatives have made the following informal proposals and requests for further clarification by the Department:

Article VI:

1. The Japanese propose that the phrase, "shall not be subject to molestation or to entry without just cause", be amended to

read "shall not be subject to unlawful entry or molestation". They declare that the latter phraseology is not only clearer when translated into Japanese, but also that it follows more closely the wording employed in the treaties with Ireland, Israel, Greece, and Denmark.

2. The phrase "full equivalent of the property taken", is still under consideration by the Japanese who state that local laws permit compensation in kind in certain cases. It is not believed, however, that they will press their suggestion for a modification in this wording.

3. The Japanese believe that Paragraph 4 of this Article should—because of its subject—be an entirely separate article, employing exactly the same phraseology. They point to the treaty with Greece as an example of this separate treatment.

4. The Japanese further propose that the extension of national and MFN treatment in Paragraph 5, Article VI, should not be limited to Paragraphs 2 and 3, as specified in the standard draft, but should also extend to Paragraph 1. Their suggested change reads "with respect to the matters set forth in Paragraphs 1, 2, and 3 of the present Article".

Article VII:

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1. In view of restrictions already in effect regarding the business activities of foreigners in Japan, the Ministry's representatives declared that Article VII in its present form was far too general and would be subject to various interpretations when translated into Japanese. They raised a number of questions regarding this article and concluded that they preferred the more precise form employed in the treaties with other countries. They proposed, therefore, that Articles VII and VIII of the treaty with Colombia be substituted for Article VII of the standard draft.

2. The Japanese further pointed out that Japan presently restricts the purchase of stocks in local currency by foreigners, and propose that a reservation on this point be incorporated in a protocol to the treaty.

3. In connection with Paragraph 2, Article VII, of the standard draft, the Japanese questioned whether certain rights acquired by foreigners under the Occupation would be exempt from the application of new limitations imposed on aliens. This is another expression of the Japanese hope that none of the "unusual conditions of Occupation" will be further supported under the provisions of the treaty.

4. If their proposal regarding the use of Articles VII and VIII of the treaty with Colombia is not acceptable, the Japanese will request consideration of a new draft Article VII clearly enumerating the various types of business activities contemplated under this article.

Article VIII:

1. The Japanese stated that they prefer the wording employed in the treaty with Greece, and propose that Paragraph 1 of this article be so amended. They propose, therefore, the additional phrase "on a temporary basis" after the clause "shall be permitted to engage". They further propose another addition towards the end of the paragraph so that this might read, "such nationals and companies, for the exclusive account of their employers in connection with the planning . . ." The Department's comments on these points would be appreciated,

since an explanation of why this wording may have been necessary only in connection with Greece might satisfy the Japanese representatives.

2. The Japanese further propose that Paragraph 2 be amplified to enumerate the professions reserved to nationals (pilots, notaries public, et cetera), as was done in the treaties with Greece and Denmark.

3. Also in connection with Paragraph 2, the Ministry's represtatives [sic] questioned whether Japanese in the United States were not in fact barred from certain professions by various State laws "merely by reason of their alienage". Further information was requested regarding

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the practice of law, medicine, and engineering in the various States. The Department's comments on this point—regarded as of great importance by the Japanese—would be most helpful.

4. The question was also raised as to whether Paragraph 3 of this article should not be included in Article VII, because of its similar subject matter.

Article IX:

1. The Ministry officials urged that the standard draft article—the only one which specifically establishes one set of standards for Japanese and another for Americans—be revised. They strongly requested the deletion of Paragraphs 1 and 2, and the adoption of a "uniform formula applicable to both parties"

as in the treaty with Denmark. They pointed out that Article IX in its present form would raise serious problems in the Diet regarding Japanese ownership of real property in various States—a subject on which Japanese officials are particularly sensitive. The Ministry's representatives declared that they plan to discuss this point with the Prime Minister, but will await the Department's reply on the acceptability of the wording employed in the treaty with Denmark.

2. The Japanese requested information as to the "enterprises carrying on particular types of activity" (Paragraph 4) in which alien interests are restricted. They expressed particular interest regarding the types of enterprises of this kind which might exist in the United States.

Article X:

The Japanese representatives stated that they understood that the question of copyright protection need not be covered in a treaty of this kind, since other appropriate international agreements refer specifically to copyrights. They added, however, that industrial property rights are similarly treated under the "Convention d'Union pour la Protection de la Propriete Industrielle", recently ratified by both the United States and Japan. They question the need, therefore, for dealing with industrial property rights—and not with copyrights—in the present treaty and request full clarification of this point in order that an adequate explanation may be made to other Ministries and the Diet.

Article XI:

1. With respect to clauses (a) and (b) of Paragraph 5, Article XI, the Japanese expressed a preference for the terminology employed in the treaty with Colombia. They propose, therefore, that "specific tax advantages" in the standard draft be amended to read "specific advantages as to taxes, fees and charges", and that the following clause (b) read "accord special advantages" instead

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of the standard draft's "accord special tax advantages".

2. In clause (c) of Paragraph 5, the standard draft mentions special provisions with respect to "non-residents", while the treaty with Ireland (Article IX) uses the terminology "non-resident nationals". The Japanese indicated they prefer the latter phraseology, but that they will study this point further if any clarification of the standard draft wording can be furnished.

Article XII:

The Ministry's representatives appeared to agree with Mission officers that this article on exchange controls will permit the continuation of measures to safeguard Japan's balance of payments position. The Japanese pointed out, however, that it will be necessary at times to limit import allocations in one currency in order to promote imports from a specific area (an example is the present emphasis on imports from the Sterling Area because of Japan's excessive holdings of sterling). If such freedom of action is not contemplated under Article XII—or if it might be restricted under Paragraphs 3 (b) and 5 of Article XIV—the Japanese may request the addition of another clause similar to that on inconvertible currencies covered in Paragraph 5 of the Protocol to the treaty with Uruguay. The Department's earliest comments on the question raised by the Japanese—and on their proposal for an additional clause similar to that in the Protocol with Uruguay, or in Paragraph 6 of the Protocol to the treaty with Israel—would be appreciated.

Article XIII:

No questions were raised on this article by the Ministry's representatives.

Article XIV:

1. The Japanese point out that the last sentence in Paragraph 1, beginning "A like rule . . .", is not contained in any other United States treaty. Although they indicated they had no objection to this clause, they requested its further clarification. According to the Japanese interpretation, MFN treatment with regard to the international transfer of payments for imports and exports refers to the actual transfer formalities, and does not limit Japan's right to discriminate against any currency or country in the implementation of its quarterly foreign exchange budgets. The same reservation is made in connection with Paragraphs 2 and 3 b regarding restrictions on imports under the quarterly budget system.

2. With respect to Paragraph 3, the Japanese point out that sub-paragraph (a) is not included in the treaties with Colombia and other countries. Japan presently publicizes its quarterly foreign exchange budgets and issues specific import allocation notices.

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Government officials believe, however, that the latter probably result in price increases on the part of foreign suppliers, and it is possible that the import notice system may be modified. Al-

though the Japanese are not opposed in principle to this sub-paragraph, they do not feel that it is a matter properly included in a bilateral treaty. Since this is a general subject of interest to all countries, multilateral treatment is preferred. The Department's comments on the need for the inclusion of sub-paragraph (a) with respect to Japan alone have been requested by the Ministry's representatives.

3. The Japanese wish to impose restrictions on imports of prison-made goods, and on exports of national treasures and certain natural resources subject to conservation controls. They inquired whether such restrictions were properly covered by Paragraph 4 ("prohibitions or restrictions on sanitary or other customary grounds of a non-commercial nature"). The Mission's explanation that this clause gave Japan the right to impose restrictions along the lines indicated above was accepted by the Ministry's representatives.

4. The rather broad terminology employed in Paragraph 5 regarding national and MFN treatment "with respect to all matters relating to importation and exportation" has also been questioned in connection with foreign exchange budget allocations. The Japanese want to make certain that their present frankly discriminatory import allocation policies are permissible under the various articles of the treaty.

Article XV:

No reservations on the part of the Japanese representatives.

Article XVI:

No reservations.

Article XVII:

A number of questions were raised by the Japanese in connection with state trading in view of the existence of the Government Monopoly system (e.g., on tobacco and salt) in Japan. All points were explained satisfactorily, but the Japanese again requested assurances that their Monopoly trading could be carried out un-

der foreign exchange budget policies without contravening this or other articles in the standard draft. They pointed out that Government Monopoly purchases could be made from certain sources, despite higher costs as compared with other suppliers, in order to utilize inconvertible currencies. At the present time, Sterling Area prices on some commodities are 30 per cent higher than dollar area prices. Clarification is requested as to whether a Government Monopoly could procure Sterling Area goods regardless of the price factor—thus

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reducing Japan's mounting sterling credits—within the framework of Article XVII.

Although progress has been somewhat slow in the past four informal conferences—the Japanese attaching great importance to the various points outlined above—it is believed that the exploratory talks may be concluded by December 18. The Ministry's representatives have indicated that they will begin discussions about December 18 with other Ministries to ascertain their views on what may be points of negotiation in the contemplated formal negotiations. They have informed the Mission that, in order to prevent leakages to the press which they regard as likely, they will use the published text of the treaty with Colombia in their discussions with other Ministries. They have requested, however, that the various proposals and questions now reported, receive prompt consideration as they may be called upon for detailed explanations by other Government agencies. The Ministry's representatives stated that they believe that the Japanese

Government would be ready to proceed with formal negotiations by about January 15, 1952.

The Department's earliest reply on the various questions and proposals set forth above would be appreciated.

For the Political Adviser:

[Comment: Document is signed]

Peyton Kerr
First Secretary of Mission

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Exhibit 3

[Comment: Imprinted on top of page:

OUTGOING AIRGRAM
DEPARTMENT OF STATE DIVISION OF
COMMUNICATIONS AND RECORDS
TELEGRAPH BRANCH

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83 RESTRICTED SECURITY INFORMATION
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CIA Subject: FCN Treaty with Japan. Mission's
DCR despatch 915. DMC 17.
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This is the fourth in the series of replies to ref. despatch.

Article VII.

1. The first paragraph of this Article can be considered the heart of the treaty; it is the basic "establishment" provision, prescribing the fundamental principle governing the doing of business and the making of investments, in a treaty which is above all a treaty of establishment. A satisfactory formulation of it, and its corollary provisions in the remainder of the Article, is therefore of particular importance and to be approached with especial care.

The new standard formulation of Article VII (and its companion, VIII) as proposed to Japan has already appeared in the treaty with Israel, but was developed too recently for use in the negotiations leading to the other treaties hitherto signed. Its inclusion in a treaty with Japan would not, therefore, be unprecedented, as the Japanese appear to suppose. The formulation proposed to Japan is considered to be more precise than that formerly in use (as appearing in the Colombia treaty, for example); and it is not believed that the substitution of the Colombia treaty wording would meet the avowed Japanese desire for greater precision. Rather, the contrary is probably the case.

While the formulation as found in the Colombia treaty is a respectable, worthy and much used one, it has been open to certain criticisms. The use of the recitative technique ("commercial, manufacturing . . . etc.") for describing the types of activities covered by

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covered by the national treatment rule needlessly leaves play for interpretation as to exactly what businesses are and what are not covered, especially the borderline cases; and the residual rule applicable to types of activities not covered by national treatment is not as adequate as might be, among the latter being activities in which Americans have heavy investment interests abroad (mining, petroleum, public utilities and tropical agriculture). This formulation has also led sometimes to translation difficulties, as well as to the need for devising various explanatory materials in the Protocol and interpretative minutes. The Department has en-

deavored to remove or reduce such criticisms by the device employed, in the new standard formulation, of first stipulating the principle of swooping coverage for all business activities, of every type and in whatever juridical form (paragraph 1), and, second, of then drafting an exception precisely defining what is not so covered and of stipulating the rule applicable thereto (paragraph 2). Although the Department considers the new standard formulation definitely preferable in general, it will keep open mind about the possible substitution therefor of the Colombia formulation in the Japanese case, if after further discussion and study of Japanese views and circumstances it should transpire that this would be expedient.

2. As to restrictions applicable to alien purchase of Japanese securities, reference may be made to paragraph 4 of Article D for Department's standard provision in this connection. This reservation is of limited scope, in conformity with the purposes and scheme of the Department's treaty proposals. If it is not adequate for the Japanese, it will be necessary to have exact information as to wherein and why it is inadequate, as a prelude to exploring what if any adjustment may be satisfactory and proper. The Department approaches with caution any proposal to weaken the principles it advocated with respect to equality of opportunity in investment and business.

3. The FCN treaty is not designed to continue the occupation or any features thereof. Except that the conclusion of the treaty presupposes full Japanese sovereign status, the treaty in and of itself

itself is in principle entirely neutral as to occupation matters. However, the bearing of paragraph 2 of Article VII on the continuance of private rights that may have become established under and during the occupation may be a different question, concerning which the Department would not care to venture an opinion in vacuo. It is therefore requested that the Japanese explain just what situations and problems they visualize in this connection.

4. As mentioned under point 1 above, the Department, while not yet ready to concur in substituting the Colombia treaty wording, does not foreclose the possibility of accepting the Japanese suggestion to this effect after further exploration of the exact Japanese objections to the present standard wording. It would probably help in the analysis of the problem to have from the Japanese more concrete information as to what they mean by a "new draft clearly enumerating the various types of business activities contemplated."

Article VIII.

1. The Japanese suggestions evidently relate to the second sentence of paragraph 1, and not to the first sentence. The two additional phrases mentioned, as incorporated in the Greek treaty, were not there regarded as changing in any significant way the intent of the provision. They rendered explicit what was already pretty much implicit in the original wording. In the Department's opinion they are rather unnecessary, as they merely add superfluous wordage to an already wordy sentence; but the Department would undoubtedly be willing to accept them if the Japanese feel they would be necessary and appropriate.

2. Before discussing a possible enumeration of particular professions to be excepted from the rule of paragraph 2, the Department would wish to have a complete list of those which the Japanese would want to be so enumerated; and a serious consideration of whether, in light of the remarks under "3" below, the Japanese

indeed

indeed wish to press for any exceptions. While it may be possible, if necessary, to consider excepting a limited number of professions that enjoy an especially sensitive status, the Department might be inclined rather to favor dropping paragraph 2 altogether than to have it seriously undermined by an immoderate list of reserved professions.

3. There are indeed numerous state laws barring aliens from the practice of various professions. All states (including the District of Columbia) require that attorneys-at-law be citizens. As to physicians, thirteen impose citizenship requirements and an additional twelve do not license aliens to practice unless they have filed declaration of intention to become citizens, making a total of 25 having alienage disabilities. As to engineers, seven impose citizenship requirements, and an additional seven exclude nondeclarant aliens, for a total of 14. (The foregoing is derived from a compilation made in 1946. If past experience is a reliable guide, more up-to-date information could be expected to show a greater, rather than a less, amount of restrictions against aliens). There are, of course, numerous other professions and occupations (ranging from accountant to wrestling promoter) which are reserved in the laws of one, several, or many states. The pattern is very variable and uneven.

The existence of such statutory disabilities, of course, underscores the advantage to the Japanese of including paragraph 2 in the treaty. The treaty, being the supreme law of the land and enforceable as such before the court, is paramount over all state

legislation. To the extent that the treaty contained a national treatment provision on the professions, any contrary provisions of state law would be *ipso facto* overriden, insofar as Japanese nationals were concerned.

4. The question of where the provisions of paragraph 3 may most logically be carried is essentially a question of force; and the Department does not visualize any difficulty in reaching perfect agreement thereon with the Japanese.

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Exhibit 4

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Encl. No. 4
Page #1 of 5
Desp No. 13—Tokyo
[Comment: "Desp No. 13" is circled]

Office of the United States Political Adviser for Japan, Tokyo.
Tokyo.

[Comment:
"FCN 2 Japan" is handwritten here]

MEMORANDUM OF CONVERSATION

Subject: Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation

Participants: For the Ministry of Foreign Affairs:
Mr. Kenichi OTABE, Vice Director, Economic Affairs Bureau
Mr. Haruki MORI, Chief, First Section, Economic Affairs Bureau
Mr. Takeshi KANEMATSU, Secretary, First Section, Economic Affairs Bureau
Mr. Kay MIYAGAWA, Secretary, First Section, Economic Affairs Bureau
Mr. Masao OSATO, Chief, Fourth Section, Treaties Bureau
Mr. Mikizo NAGAI, Chief, Sixth Section, Economic Affairs Bureau

For the Office of the United States Political Adviser, Japan:
Mr. Jules BASSIN, Legal Attache
Mr. Dudley G. SINGER, Commercial Attache
Mr. Robert W. ADAMS, Second Secretary

Place: Office of the United States Political Adviser, Tokyo, Japan.

Date: Tuesday, April 8, 1952.

FOURTEENTH INFORMAL MEETING

ARTICLE XX

Mr. Otabe stated that in order to avoid any possible differences in interpretation it should be clearly understood that the meaning of the word "transit", as used in Article XX, was the same as that used in Article V, paragraph 1 of the GATT, which states:

> "Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this Article 'traffic in transit'."

Mr. Otabe added that it should also be understood that "transit through the territories of each Party", mentioned in Article XX, includes passengers, baggage, and products carried by aircraft.

Mr. Singer replied that the GATT definition of "transit" was acceptable in interpreting Article XX, and that Mr. Otabe's understanding with reference to

the inclusion of aircraft traffic was correct.

Mr. Otabe stated that under present regulations, export validations are required in Japan for the temporary unloading and trans-shipment of cargoes when these involve specific commodities subject to export licensing under Japan's security export control procedures. He asked for confirmation of his understanding that the implementation of security export controls would not be regarded as constituting "unnecessary delays and restrictions", as mentioned in Article XX.

Mr. Adams replied that Mr. Otabe was correct in his understanding, and that security measures, including export validations and licenses, were permissible under paragraph 1(d), Article XXI.

ARTICLE XXI

Mr. Otabe referred to previous discussions on Article VIII (at the fifth meeting, March 7, 1952) when the Japanese side had proposed that the second sentence of paragraph 3 (i.e. "Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities.") be deleted from that Article in as much as this clause was of general application. Mr. Otabe stated that this provision might more appropriately fit in Article XXI, and he now proposed that it be inserted in the latter Article.

Mr. Adams replied that when this clause was included in the provision on general exceptions in other United States FCN Treaties (for example in the Treaties with Colombia, Israel, Uruguay and others), the phraseology employed was: "The present Treaty does not accord any rights to engage in political activities". Subject to the views of the Department of State, which might prefer to use the terminology just mentioned, Mr. Adams suggested that this Article be amended as proposed by Mr. Otabe (i.e., that the second sentence, paragraph 3, Article VIII be inserted in Article XXI as paragraph 3-bis, for subsequent re-numbering in the final draft).

Mr. Otabe stated that the Japanese side earnestly desired that the second sentence of paragraph 3, Article XXI, reading,

"Similarly, the most-favored-nation provisions of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid Agreement" (i.e., GATT), be deleted from this Article. Mr. Otabe pointed out that since Japan is not a member of the GATT, such concessions as are granted by the United States under a multilateral Agreement not yet open to Japan, would be outside the scope of the Application of most-favored-nation treatment. The purpose of the present treaty prescribing unconditional most-favored-nation treatment would therefore actually be defeated in practice. Furthermore, he said, since the United States is in fact granting the GATT concessions to Japan, the deletion of this sentence would have no effect on the actual relations between the two countries. He again pointed out that the present FCN Treaty will become a model for future treaties to be negotiated between Japan and other countries, and that it was feared that the inclusion of this sentence would establish an unfavorable and most unfortunate precedent, particularly in connection with early negotiations anticipated between Japan and countries already in the GATT.

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Encl. No. 4
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Desp No. 13—Tokyo

Mr. Singer stated that the Department of State had proposed and secured the standard GATT reservation in previous negotiations on the assumption that the country concerned was actually free to come into the GATT, and that any failure on its part to be in the GATT, being of its own choosing, had no effect on the propriety of this reservation. He pointed out that it was not the desire of the United States to use the GATT reservation in order to impose unequal trade relations, and that the Department of State had indicated that some adjustment might be made in the present case in view of the special

circumstances involved. There was as yet no definite idea as to what the appropriate solution might be, but it was believed that it should be in the nature of a clarification or qualification of the third paragraph.

Mr. Adams added that paragraph 3 was essential to the FCN Treaty, but that the American side would be most willing to consider any solution the Japanese would desire to submit. He stated that a bilateral treaty could not, of course, commit the United States to any course of action inconsistent with its obligations under the GATT, and that it appeared therefore that any qualification suggested by the Japanese side should be made with reference to the second sentence of paragraph 3, and not to the first sentence.

Mr. Bassin added that the Department of State wished to reassure the Japanese representatives that their point of view was fully appreciated, and that it was prepared to approach this problem in a sympathetic manner, fully confident that a mutually satisfactory solution can be found.

Mr. Otabe replied that further consideration would be given this matter, and that the Japanese side would be prepared to discuss a proposed clarification or qualification of this paragraph, possibly at the next meeting.

With respect to paragraph 4, Article XXI, Mr. Otabe asked for a definition of "limited purposes". He asked whether a treaty trader or an employee of a Japanese company, permitted to enter the United States in connection with the activities of that company, might subsequently enter the employment of another company, for example of a domestic American firm, without violating the provisions of this paragraph. He also inquired whether employment in another Japanese firm, for example a subsidiary or affiliate of the company originally employing this individual, would be permissible.

Mr. Adams replied that a treaty trader or an employee of the type mentioned by Mr. Otabe would be permitted entry into the United States as a non-immigrant, subject to specific

limitations on his activities. He added that various types of visas of a non-immigrant or temporary character are issued for entry into the United States; these are granted subject to varying conditions, qualifications or restrictions, and are valid for varying periods, ranging from a few months (for tourists) to an indefinite period of stay (for the so-called treaty traders). The latter are issued a visas of indefinite tenure, valid for so long as they continue to promote trade and commerce between the United States and their country. These individuals could change employment while in the United States, provided, of course, the character of their employment remained unchanged and they continued to promote trade and commerce between the United States and their country. This change could be made with the prior knowledge and approval of the appropriate officials of the

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(Classification)

Page #4 of 5
Desp No. 13—Tokyo

Department of Justice (the Immigration and Naturalization Service of the United States).

In reply to further questions put by Mr. Nagai, Mr. Adams stated that it is only the individual who enters the United States as an immigrant for permanent residence who is not subject to specific limitations or restrictions on his business or professional activities. Mr. Adams added that the Japanese employee previously mentioned by Mr. Otabe would not be permitted to resign from a Japanese firm in order freely to seek employment in the United States. It was possible, however, for this employee to leave one Japanese branch firm to work for an affiliate or subsidiary of that firm, or even for another legitimate Japanese enterprise also engaged in promoting commerce between Japan and the United States, without losing his treaty trader status, provided the prior approval of the Department of Justice were obtained.

ARTICLE XXII

Mr. Otabe asked for a clarification as to the difference between corporation and company, and for a definition of partnerships and other associations as used in paragraph 3, Article XXII.

Mr. Bassin replied that a company is a society or association of persons interested in a common object and uniting themselves for the prosecution of some commercial or industrial undertaking or other legitimate business. The word, he added, is a generic and comprehensive term which may include individuals, partnerships and corporations. Furthermore, the term is not necessarily limited to a trading or commercial body, but may include organizations to promote fraternity among its members and to provide mutual aid and protection. He added that the word is sometimes applicable to a single entrepreneur.

Mr. Bassin stated that a corporation, on the other hand, is an artifical person or legal entity, created under the authority of the law of a state or subdivision thereof. It consists of an association of numerous individuals as a group under a special denomination which is regarded in law as having a personality and existance distinct from that of its several members. A corporation is vested with the capacity of continuous succession, either in perpetuity or for a limited term of years, and acts as a unit or single individual in matters related to the common purpose of the association within the scope of the powers and authority conferred upon it by law. The words "company" and "corporation" are commonly used as interchangeable terms. Strictly speaking, however, Mr. Bassin said, a company is an association of persons for business or other purposes and may be incorporated or not.

Mr. Bassin further stated that a partnership is a voluntary contract or association between two or more persons to place the money, effects, labor and/or skill of some or all of them in lawful commerce or business, with the understanding that there shall be a proportionate sharing of the profits and losses among them. An association, Mr. Bassin stated, is the union of a number of persons for some special purpose or business. It is

generally an unincorporated society, and may consist of a body of persons united and acting together without a charter but pursuant to the methods and forms used by incorporated bodies for the prosecution of a common enterprise. The word "association" is a generic term and may at different times

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(Classification)

comprehend a voluntary association, such as a partnership, which is dissoluble by the persons who formed it, or a corporation dissoluble only by law.

Mr. Otabe stated that these definitions were satisfactory and would be helpful in properly translating this Article into Japanese. He then asked if the various religious groups and foundations in the United States were considered juridical persons, and whether they were included in paragraph 3.

Mr. Bassin replied that organized religious groups and foundations may be juridical persons, but are usually unincorporated associations.

Mr. Otabe inquired whether a Zaidan Hojin was covered by paragraph 3, and, if so, what would be the nature of national treatment accorded such organizations in the United States. He explained that a Zaidan Hojin is a duly organized juridical person with given property, established for the purpose of employing or disposing of said property for a given public purpose. An example of a Zaidan Hojin, he added, would be an endowed private library.

Mr. Bassin replied such an organization would be considered a juridical person in the United States, pursuant to the provisions of paragraph 3, if it were so considered in Japan.

Mr. Nagai then asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned

in paragraph 3 meant anything more than the recognition of the existence of a juridical person.

Mr. Bassin replied that "juridical status" meant "legal status", the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph 3, he added, meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party.

It was then agreed that the next meeting would be held on Friday, April 11, 1952, with discussions to begin on Article XXIII.

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Exhibit 5

OUTGOING AIRGRAM

[LETTERHEAD OF DEPARTMENT OF STATE]

[NOTE: Each page of this document is typed on Department of State letterhead.]

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Classification

2449

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AMEMBASSY,
TOKYO

A-49, July 23, 1952

[Comment: Stamp indicating nos. "611.944/6-1952" appears along right margin of page]

SUBJECT: FCN Treaty. Interpretation of Certain Provisions Embassy Despatch 269, June 19, 1952

There follow comments on the specific questions raised in reference Despatch:

a. The analysis of this question begins with the second sentence of Article XXII, Paragraph 3, which establishes that whether or not a juridical entity is a "company" of either Party, for treaty purposes, is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority stockholders are

disregarded. Under such a simple test, however, nationals of third countries could indirectly but effectively secure valuable treaty rights through taking advantage of liberal corporation laws. Thus to take a hypothetical example, citizens of country X which had refused to make a reciprocity treaty with Japan, and which was even on bad relations with Japan, might, nevertheless, enjoy unilaterally many business advantages in Japan, ordinarily accruing only to friendly treaty nations, by the device of setting up and operating through a Delaware corporation. The purpose of Paragraph 1(e) of Article XXI is to leave each party free to protect itself against such an eventuality, as it might wish, by allowing it to "pierce the corporate veil" of companies chartered under the laws of the other Party, for most treaty purposes.

The rule of Article XXI, Paragraph 1(e) has to do with the treatment one party is obligated to accord to "companies" of the other party, such companies being as defined in Article XXII(3). The rule of the second sentence of Article VI, Paragraph 5, on the other hand, relates to "enterprises" in which such companies (or nationals) have a substantial interest. The word "enterprises" is not a synonym for "companies"; it is a much broader term, having to do with a business undertaking or establishment in the large and popular sense, regardless of juridical

form,

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Classification

Corrections made on this original MUST be made on all copies before delivery to Airgram Section, Telegraph Branch.

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Stamp "C SA" along lower right margin of page, as well as handwritten nos. "611.944/6-1952"

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[End of page]

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Classification

Tokyo,
A-49, July 23, 1952

form, nationality, etc.

The rule of paragraph 1(e), Article XXI, has bearing on the second sentence of Article VI(5) only to the extent that the word "companies" is used therein. If an American-chartered company had a substantial interest in an enterprise in Japan, the Japanese Government would be obligated to give the treatment specified if such company were in fact American controlled, but not if such a company were controlled by nationals of third countries. The question of who controls the company is quite distinct from the question of who has what interest in the "enterprise" itself.

Thus the Japanese supposition that there is conflict between the provisions of VI(5) and [Comment: "XXI(a) crossed out with X's" and "XXI(1)(e)" is inserted] is not well grounded.

b. Article IX(1)(a) provides that Japanese nationals and co. panies shall have rights with respect to acquiring, using, and occupying land, structures, and other realty appropriate to the conduct of any activity in which they are entitled to engage pursuant to Article VII. The last sentence of Article VII(2) clearly provides for establishing and maintaining branches and

agencies for the conduct of international transportation activity, which in the Department's intent covers international shipping. In order to make the last point clear, however, the Department authorizes the insertion of the words "shipping or other" before the word "transportation". Insofar, therefore, as tenure rights to wharves, warehouses, and other installations are reasonably necessary to the effective conduct of an international shipping operation, such rights are assured by Article IX(1)(a). Precisely what tenure rights may be reasonably necessary to the effective conduct of such an operation in a particular case, cannot, of course, be determined in vacuo; but the Department does not believe it is necessary to attempt to write more categorical language into the treaty on this point.

It should be further noted that Article XIX(3) provides for non-discrimination as to the access of vessels to ports, and to port and shipping facilities, insofar as such access is afforded to any international shipping on an other than tenure basis.

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Corrections made on this original MUST be made on all copies before delivery to Airgram Section, Telegraph Branch.

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Classification

Tokyo,
A-49, July 23, 1952

The right to enjoy the use of all appropriate facilities thus appears to be amply covered, without any further modification.

c. In analyzing the question here presented, it is necessary to distinguish between the ship operator, on the one hand, and the ship builder on the other. The ship operator engages in an establishment activity reserved from the treaty (Article VII(2), first sentence). Thus each party, so long as it does not violate some other provision of the treaty, retains full freedom to subsidize its own citizen-owned, national shipping, without being obliged to extend such subsidies to shipping owned by nationals of the other party.

The "citizens" referred to in 46 USC 1151 are ship operators. The construction subsidy is granted upon application of the ship operator, and on his behalf. The law does not specify that the ship builder, who is ultimately awarded the construction contract, be a citizen. The law speaks only of a "shipyard within the continental limits of the United States" (Sec. 1155) without reference to the nationalities of the owners of the shipyard. By contrast, the citizenship of the ship operator is repeatedly mentioned; and the avowed objective of the act (Sec. 1101) is to foster a citizen-owned merchant marine (not citizen-owned shipyard), [sic] As to the precise question of how this law is "interpreted", the Department is unaware that there has been occasion to interpret it on this specific point, or that any problem has ever arisen over it. The Department does not have the function of interpreting such laws; it can only point out that the law, contrary to the Japanese reading of it, does not provide that ship-building subsidies be restricted to American citizens.

The Department understands that the Embassy would like also two other points to be clarified, as follows:

1. As to the right of non-resident recipients of benefits under Article IV to convert yen payments into dollars. This Article provides national treatment. This means that insofar as this Article is concerned, the American non-resident beneficiary has a treaty right to exchange convertibility only to the extent that a Japanese non-resident would enjoy this privilege under Japanese law and regulation.

Further than this, however, it may be noted that the non-resident American would have such rights as are provided in Article XII; that is, no restrictions on convertibility except as may be allowed by the second paragraph of that Article, and, in situations where restrictions are necessary and allowable, he would enjoy such advantages as may be afforded by the phrase "giving consideration to special needs for other transactions" in Paragraph 3 and by the "no arbitrary discrimination" precept of paragraph 4.

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Classification

Tokyo,
A-49, July 23, 1952

-4-

2. As to the precise meaning of the terms "trade names" and "trade labels" in Article X—the Department would have only the following observation to add to the Embassy's previous report of its explanation: These terms are merely by way of illustrating, along with "patents" and "trade-marks", the more common types of industrial property. The phrase "industrial property of every kind" is all-inclusive. It is thus unnecessary to have, in connection with the treaty, highly refined and precise definitions of the concepts "marks", "names" and "labels". It would indeed be quite permissible for Japanese

and American law to differ substantially from each other in this and other industrial property matters. The Article's purpose is to provide national treatment with respect to whatever the laws of the country happen to provide with respect to recognizing and protecting industrial property; and the Japanese may make a free translation of secondary technical terms if transliteration proves to be difficult.

ACHESON

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7/11/52

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Classification

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Exhibit 6

[SEAL]

DEPARTMENT OF STATE

TELEGRAM

UNCLASSIFIED 0314

PAGE 01 TOKYO 03989 280337Z

14-11
ACTION EA-10

INFO OCT-01 ISO-00 H-02 L-02 SCA-01 VOE-00 /016 W
018438

P 280315Z MAR 75
FM AMENEASSY TOKYO
TO SECSTATE WASHDC PRIORITY 8965

UNCLAS TOKYO 3989

E.O. 11652: N/A
TAGS: CGEN, CVIS, JA, L
SUBJECT: CONGRESSIONAL CORRESPONDENCE: MELVIN CRONIN'S JAPANESE VISA APPLICATION

REF: STATE 27746, TOKYO 1664 AND PREVIOUS

PASS TO SENATOR CRANSTON AND CONGRESSMAN BURTON

1. EMB HAS BEEN ADVISED BY MFA THAT AFTER CAREFUL CONSIDERATION ITS LEGAL STAFF IS OF OPINION THAT THE CASE OF CRONIN AND ANOTHER INVOLVING THE EMPLOYEE OF AN INDIVIDUAL AMERICAN PROPRIETOR DOING BUSINESS IN JAPAN DO NOT RPT NOT COME WITHIN THE PROVISION OF THE TREATY, APPARENTLY BECAUSE CRONIN'S EMPLOYER IS A JAPANESE CORPORATION EVEN

THOUGH ALL STOCK OWNED BY AN AMERICAN. EMB HAS REQUESTED AN EXPLANATION IN WRITING OF THE REASONING ON WHICH THIS OPINION WAS BASED AND THIS SHOULD BE FORTHCOMING NEXT WEEK. AT THAT TIME EMB WILL SUBMIT THE MFA REASONING AND ITS OWN VIEWS WITH RESPECT TO FURTHER ACTION BY EMB AND DEPT AS JAPANESE VIEW OF TREATY OBLIGATIONS IN THESE CASES IS DIRECTLY OPPOSITE THAT BEING FOLLOWED BY U.S.

2. HOWEVER, IN THE INTERESTS OF OUR MUTUAL GOOD RELATIONS, MFA OFFICIAL STATED THAT IT HAD REQUESTED BUREAU OF IMMIGRATION TO ENDEAVOR TO WORK OUT SOME AD HOC BASIS UPON WHICH THE VISA TO CRONIN AND THE OTHER AMERICAN COULD BE ISSUED. AFTER DELAY OF SEVEAL WEEKS BUREAU OF IMMIGRATION HAS INFORMED MFA THAT IT HAS WORKED OUT A QUOTE RATIONALE UNQUOTE AND HAS THEREFORE APPROVED ISSUANCE OF COMMERCIAL VISAS IN THESE TWO CASES. THIS INFO HAS BEEN CONVEYED TO CRONIN'S EMPLOYER WHO IS CONTACTING CRONIN WITH INSTRUCTIONS TO REAPPLY FOR HIS VISA AT THE JAPANESE CONSULATE GENERAL IN SAN FRANCISCO. HOPEFULLY, CRONIN CASE HAS BEEN RESOLVED.

SHOESMITH

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Exhibit 7

[SEAL]

DEPARTMENT OF STATE

TELEGRAM

[Comment: stamp stating: "LEGAL ADVISER Aug 15 1975 Department of State" on right margin]

UNCLASSIFIED 6071

PAGE 01 TOKYO 11177 130524Z

21
ACTION L-03

INFO OCT-01 EA-09 ISO-00 SCA-01 SCSE-00 EB-07 COME-00 TRSE-00 VOE-00 /021 W 047657

R 130506Z AUG 75
FM AMEMBASSY TOKYO
TO SECSTATE WASHDC 2418

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UNCLAS TOKYO 11177

FOR L/SCA

E.O. 11652:N/A
TAGS: CGEN, CVIS, JA
SUBJECT: GOJ INTERPRETATION OF FCN TREATY

REF: TOKYO 3989, 28 MAR 75

1. AS INDICATED IN REFTEL GOJ FINALLY AUTHORIZED COMMERCIAL VISAS IN TWO CASES IN QUESTION ON STRICTLY AD HOC BASIS CONTENDING AMERICANS INVOLVED WERE NOT ENTITLED TO TREATY BONEFITS [sic]. MFA STATES THAT ITS LEGAL ADVISERS HAVENOT COMPLETED STUDY BUT ARE-PRESENTLY OF VIEW THAT UNDER THE WORDING OF

THE SECOND SETENCE OF PARAGRAPH THREE OF ARTICLE XXII OF THE TREATY A COMPANY INCORPORATED IN JAPAN, OR AN INDIVIDUAL DOING BUSINESS AS SINGLE PROPRIETOR, EVEN THOUGH WHOLLY AMERICAN OWNED, IS NEVERTHELESS A JAPANESE COMPANY AND EXCLUDED FROM TREATY BENEFITS. THE SENTENCE IN QUESTION READS: QUOTE COMPANIES CONSTITUTED UNDER THE APPLICABLE LAWS AND REGULATIONS WITHIN THE TERRITORIES OF EITHER PARTY SHALL BE DEEMED COMPANIES THEREOF AND SHALL HAVE THEIR JURIDICAL STATUS RECOGNIZED WITHIN THE TERRITORIES OF THE OTHER PARTY. UNQUOTE.

2. EMB HAS ARGUED THAT GOJ INTERPRETATION CONFLICTS WITH THE GENERAL AIM OF THE TREATY WHICH IS TO PROMOTE TRADE AND INVESTMENTS BETWEEN OUR COUNTRIES. EMB HAS FURNISHED COMPLETE INFO TO MFA AS TO VIEW OF U.S. THAT

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DEPARTMENT OF STATE

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Page 02 Tokyo 11177 130524Z

NATIONALITY OF A MAJORITY OF THE STOCKHOLDERS CONSTITUTES THE NATIONALITYOF THE COMPANY. IT HAS ALSO POINTED OT THAT NATIONALS OF A THIRD COUNTRY COULD NOT OBTAIN TREATY BENEFIS SIMPLY BY INCORPORATING IN JAPAN.

3. ACTION REQUESTED: IN ORDER THAT EMB MAY PURSUE THIS QUESTION FURTHER IN AN EFFORT TO OBTAIN MORE RECIPROCAL TRATMENT FOR AMERICANS DOING BUSINESS IN JAPAN, WITHOUT RELY-

ING ON AD HOC DECISIONS, WHICH ARE TIME CONSUMING AND DIFFICULT TO OBTAIN, IT WILL BE APPRECIATED IF DEPT WILL FURNISH INFO AS TO WHETHER ANY OTHER COUNTRIES WITH WHOM WE HAVE FCN TREATIES ADHERE TO INTERPRETATION GIVEN BY JAPANESE. VIEWS OF MAJOR TRADING COUNTRIES SUCH AS FRANCE, GERMANY, ITALY, UNITED KINGDOM, NORWAY AND DENMARK WOULD BE MORE PERSUASIVE THAN SMALLER COUNTRIES. ANY OTHER IDEAS DEPT MIGHT HAVE ON THIS SUBJECT WOULD ALSO BE WELCOME.

SHOESMITH

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Exhibit 8

DEPARTMENT OF STATE

AIRGRAM

UNCLASSIFIED

NO. A-105

TO: AmEmbassy TOKYO

E.O. 11652: N/A
TAGS: CGEN, CVIS, EINV, JA

DATE: 1976 JAN-9 AM 9:45

[Comment: "FCN 2 Japan" appears in handwriting here]

FROM: Department of State

SUBJECT: GOJ Interpretation of FCN Treaty

REF: Tokyo 11177

Department Legal Adviser's office has examined meaning of paragraph 3 of Article XXII of the U.S.-Japanese FCN Treaty signed at Tokyo April 2, 1953, and fully concurs with Embassy's general position as set forth reftel.

Most persuasive arguments we have found are (a) law review article on FCNs by Herman Walker, Jr., who formulated modern (i.e., post-WW II) form of FCN treaty and negotiated many FCNs; and (b) negotiating record of U.S.-Japan FCN, especially Dispatch No. 13 from Tokyo of April 8, 1952. Both documents are enclosed. Walker cites (pp 380-81), para 3 of Japanese FCN as standard definition of company for purposes of treaty, i.e., in the standard FCN treaty "A 'company' is defined simply and broadly to mean any corporation, partnership, company or other association which has been duly formed under the laws of one of the contracting parties; that is, any 'artificial' person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit." This formulation is intended to avoid such complex questions as the law to be applied in determining

company status. Every association meeting test of valid existence must have its "company" status duly recognized and is then eligible for substantive rights granted to companies under the treaty.

In Dispatch 13 (p. 5), Jules Bassin, Legal Attache to Embassy, stated to Mr. Mikizo Nagai, Chief, Sixth

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Drafted by: L/EB:SRBond:lms Phone No.: 20347
Drafting date: 1-7-67 Contents and Classification Approved by: L/EB:PRTrimble

Clearances: L/T:JBoyd EA/J:DFSmith L/EA:PNorton

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Section, Economic Affairs Bureau, that "the recognition mentioned in the second sentence of paragraph 3 . . . meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party."

Thus, all that para 3 is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted, the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

For reasons stated above, argument in para 2 of reftel that nationality of a company is determined by nationality of shareholders is not correct. Rather, a company has nationality of place where it is established (see pp. 382-83 of Walker).

However, this does not mean that GOJ is free to deny treaty rights to U.S. subsidiary set up in Japan. While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, an American Company (i.e., one organized under U.S. law), may manage its Japanese subsidiary (i.e., a company set up under Japanese law). So too, under Article I, a U.S. national may enter Japan to direct his investment, even though the investment is a Japanese company. In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrue to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.

KISSINGER

Enclosures:

Herman Walker Law Review Article on FCNs
Dispatch No. 13 from Tokyo Apr. 8, 1952

Exhibit 9*

[First Copy]

[SEAL] DEPARTMENT OF STATE INSTRUCTION

UNCLASSIFIED
(Security Classification)

1872 1872

FOR DC USE ONLY

NO.: A-852 January 21, 1954

SUBJECT: Treaty of Friendship, Commerce and Navigation

[Comment: Nos. "611.62a4/1-854" handwritten on page]

TO: HICOG, BONN

Reference HICOG despatch No. 1904, January 8, 1954.

There follow the Department's comments with respect to the points raised by Dr. Paulich at the January 4 meeting regarding the provisions of Article II, paragraph 1.

1. The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling

* Comment: Two different copies of Exhibit 9 were furnished by the State Department. The second copy begins on page 165a, *infra*.

factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under 22 CFR 41.70, 41.71 and other applicable regulations.

2. The apparent discrepancy between the treaty and the Immigration and Nationality Act with respect to use of the term "substantial" is of no legal or practical significance either when considered in the treaty trader clause alone or taken together with

the treaty

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(Security Classification)

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EDT:CP:CHSullivan:hc 1/19/54	CP: V.G. Setser
[Comment: Initialed by CH Sullivan]	[Comment: Initialed by V.G. Setser]

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L/EUR [Comment: Initialed by hand]
VO [Initialed] L/E [Initialed]
GEA
[Initialed]

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NO.: A-852 HICOG BONN Page 2

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(Security Classification)

the treaty investor clause. Use of the term "substantial" in the treaty trader provision of the Act merely gives explicit recognition in the law to an administrative practice of long standing. It was not deemed necessary to reword the treaty as a consequence, for the treaty provision as now worded has long been applied in a manner requiring that the trade for which entry is permitted shall be substantial in character. This does not derive from Article II(1)(c), however, but from Article II(3), taken together with the general right to apply reasonable and nondiscriminatory regulations consistent with the intent and purpose of the treaty provision in order to implement the commitment and to protect the privileges accorded thereby from abuse. In the case of the treaty investor provision, however, the term "substantial" has been carried over from the law to the treaty as an aid to its construction and implementation. This was done simply because the investor clause, unlike the trader clause, is new and an established body of interpretation has not yet developed.

It may be noted in connection with hypothetical cases involving substantiality of trade that this requirement is applied in a liberal manner. In determining the substantiality of the trade within the meaning of the treaty trader clause, monetary or physical volume are not used as the exclusive criteria. The intent is to assure that the trade in question is not

a brief, isolated excursion into international trade but a sustained volume of bona fide commercial transactions. Consequently, the number of transactions, the continuous character of the operations and a number of other factors are taken into consideration as well.

(It is believed that Dr. Paulich, in discussing this point, had reference to an unofficial summary of the new immigration legislation prepared by Mr. Frank Auerbach of the Visa Office of the Department of State. This work is entitled The Immigration and Nationality Act: A Summary of Its Principal Provisions, and copies presumably are available in the office of the Supervisory Consul General.)

3. Dr. Paulich's observation that the fixing of the period of sojourn for aliens entering the United States as nonimmigrants is done by immigration officers at the port of entry rather than by consular officers when the visa is issued is correct. However, this procedure is specifically required by law and hence not merely a matter of administrative convenience. Section 214(a) of the Immigration and Nationality Act expressly vests the Attorney General with authority to prescribe by regulation the period of time for which non-immigrant aliens may be admitted to the United States. A treaty trader or treaty investor, by reason of the purposes of the treaty, is regarded as admitted on an indefinite basis as to sojourn, provided, of course, that he maintains his status as a trader or investor under the treaty. Hence the administrative regulations governing entry and sojourn (8 CFR 214e2) contain no specific limitation as to time. This does not preclude, however, requirements that the alien comply with reasonable procedures designed to assure that

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he is maintaining his status as a treaty alien and otherwise complying with the conditions of his admission; and the measures referred to by Dr. Paulich are in the nature of such requirements.

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Exhibit 9

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[SEAL] DEPARTMENT OF STATE INSTRUCTION

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NO.: A-852 January 21, 1954

SUBJECT: Treaty of Friendship, Commerce and Navigation

TO: HICOG, BONN [Comment: Handwritten nos. "611.62a4/1-854" appear on right of page]

Reference HICOG despatch No. 1904, January 8, 1954.

There follow the Department's comments with respect to the points raised by Dr. Paulich at the January 4 meeting regarding the provisions of Article II, paragraph 1.

1. The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade princi-

pally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under 22 CFR 41.70, 41.71 and other applicable regulations.

2. The apparent discrepancy between the treaty and the Immigration and Nationality Act with respect to use of the term "substantial" is of no legal or practical significance either when considered in the treaty trader clause alone or taken together with the treaty

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the treaty investor clause. Use of the term "substantial" in the treaty trader provision of the Act merely gives explicit recognition in the law to an administrative practice of long standing. It was not deemed necessary to reword the treaty as a consequence, for the treaty provision as now worded has long

been applied in a manner requiring that the trade for which entry is permitted shall be substantial in character. This does not derive from Article II(1)(c), however, but from Article II(3), taken together with the general right to apply reasonable and nondiscriminatory regulations consistent with the intent and purpose of the treaty provision in order to implement the commitment and to protect the privileges accorded thereby from abuse. In the case of the treaty investor provision, however, the term "substantial" has been carried over from the law to the treaty as an aid to its construction and implementation. This was done simply because the investor clause, unlike the trader clause, is new and an established body of interpretation has not yet developed.

It may be noted in connection with hypothetical cases involving substantiality of trade that this requirement is applied in a liberal manner. In determining the substantiality of the trade within the meaning of the treaty trader clause, monetary or physical volume are not used as the exclusive criteria. The intent is to assure that the trade in question is not a brief, isolated excursion into international trade but a sustained volume of bona fide commercial transactions. Consequently, the number of transactions, the continuous character of the operations and a number of other factors are taken into consideration as well.

(It is believed that Dr. Paulich, in discussing this point, had reference to an unofficial summary of the new immigration legislation prepared by Mr. Frank Auerbach of the Visa Office of the Department of State. This work is entitled The Immigration and Nationality Act: A Summary of its Principal Provisions, and copies presumably are available in the office of the Supervisory Consul General.)

3. Dr. Paulich's observation that the fixing of the period of sojourn for aliens entering the United States as nonimmigrants is done by immigration officers at the port of entry rather than by consular officers when the visa is issued is correct. However, this procedure is specifically required by law and hence not merely a matter of administrative convenience. Section 214(a) of the Immigration and Nationality Act expressly vests the Attorney

General with authority to prescribe by regulation the period of time for which non-immigrant aliens may be admitted to the United States. A treaty trader or treaty investor, by reason of the purposes of the treaty, is regarded as admitted on an indefinite basis as to sojourn, provided, of course, that he maintains his status as a trader or investor under the treaty. Hence the administrative regulations governing entry and sojourn (8 CFR 214e2) contain no specific limitation as to time. This does not preclude, however, requirements that the alien comply with reasonable procedures designed to assure that

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he is maintaining his status as a treaty alien and otherwise complying with the conditions of his admission; and the measures referred to by Dr. Paulich are in the nature of such requirements.

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Exhibit 10

[Form of Foreign Service Despatch Memo]

AIR POUCH
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FOREIGN SERVICE DESPATCH

2413
Desp. No.

FROM: HICOG BONN

TO: THE DEPARTMENT OF STATE, WASHINGTON

March 8, 1954
Date

REF: OURDES 2394, March 5, 1954, and previous

For Dept. Use Only	ACTION E-4	INFO	DEPT. Rep. 2 DC/R-2 OLI-6 GER-4 L-2
	REC'D 2012		OTHER CIA-7 COM-8 TR-3 FOA-10

[Comment: Above inserts are handwritten]

SUBJECT: New Treaty of Friendship, Commerce, and Navigation: Report on March 4, 1954, Sub-Committee Meeting on U.S. Article V

The Sub-Committee on U.S. Article V regarding judicial rights and commercial arbitration held its second meeting on March 4, 1954. The Sub-Committee members were the same as those reported in reference despatch.

The German side recapitulated the reasons why they could not accord national treatment with respect to security for costs and judgment and submitted the following new formulation for a clause to be inserted into the protocol, adding that it was intended as an "authentic interpretation" of paragraph 1, U.S. Article V:

> Die vertragschliessenden Teile sind darin einig, dass Artikel V, Abs. 1 des Vertrags den Angehoerigen oder den Gesellschaften des einen Teils als Klaeger oder Intervenient vor den Gerichten des anderen Teils von der Zahlung der Kaution judicatum solvi dann Befreiung erteilen sollen, wenn sie
>
> a) entweder ihren Wohnsitz oder ihren dauernden Aufenthalt oder ihren Sitz oder
>
> b) ausreichendes Vermoegen in dem Gebiet des Teils haben, vor dessen Gericht die Klage erhoben wird.

A provisional translation, prepared by the writer, is given herewith:

> "The Contracting Parties agree that Article V, paragraph 1, of the present treaty shall give exemption from security for costs and judgment judicatum solvi to the nationals and/or the companies of one Party appearing as plaintiffs or intervenors before the courts of the other Party if
>
> a) they have either their domicile or permanent residence or seat, or
>
> b) sufficient property

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in the territory of that Party before the court of which the case is heard."

The U.S. side said the German proposal was interesting and asked whether they were correct in their interpretation that "domicile" and "residence" pertained solely to individuals, whereas "seat" applied to corporations. The Germans confirmed that only natural persons could have a "domicile" or a "residence" and that a juridical person was understood to have a "seat".

The U.S. then asked whether the omission of the word "domicile" would be acceptable. The Germans replied in the affirmative, and the U.S. side then observed that they would consider further whether they wanted to suggest the deletion.

The U.S. side then inquired what requirements a U.S. corporation would have to fulfill in order to be considered as having its "seat" in Germany under German law. The Germans repeated their previous explanations to the effect that a corporation was deemed to be "seated" in a locality in which its administration was. They added that German corporations were registered in the commercial register and that such registration included data concerning the administration of the company. They further commented that a U.S. corporation

having a registered branch in Germany, yet being subordinated to its New York administrative headquarters, might be considered having its seat in Germany if the German branch of the U.S. corporation constituted an independent juridical person. The U.S. side remarked that this explained the basis for their concern, because U.S. corporations would not be able to fulfill the qualifications under German law unless they reincorporated in Germany and thus became a German juridical domestic entity, in which case they would lose their legal status as American juridical entities and become lost from the purview of the provisions. They stressed that a virtually impossible condition would thus be created and, therefore, suggested deletion of the reference to "seat", leaving only the property test for companies. Alternatively, they proposed as a substitute for "seat" the inclusion of the words "permanent establishment". As examples for their theoretical position, they explained that, in accordance with the German statement, the Chase National Bank or the American Express Company, both located at Frankfurt, Germany, would be considered as branches of American enterprises without having their seats in Germany, since their administrative headquarters were in each instance at New York. On the other hand, the Ford A.G. of Cologne and the Opel Works of Ruesselsheim, though owned by American corporations, were incorporated in Germany and were German juridical entities.

The Germans said they understood the difficulties regarding the word "seat" and remarked that the U.S. substitute proposal to insert the words "permanent establishment" (staendige Niederlassung) appeared to reflect the practicalities, though they wondered whether "permanent establishment" might not create problems since courts would have to consider whether or

not a given establishment was of a fictitious nature, and since the courts further might be reluctant to grant exemption from security if an insubstantial establishment were involved. Both sides agreed, however, to consider "permanent establishment" on a tentative and exploratory basis pending further internal consultation.

Some discussion followed as to the requirements a U.S. corporation would have to fulfill to do business in Germany and be considered having its "permanent establishment" there. The Germans stated that, in principle, the registration conditions were the same for a U.S. corporation as for a domestic company. With respect to "permanent establishment", they remarked that these words comprised a *de facto* rather than a legal description.

A third question from the U.S. side was framed as a request for an addition in order to ensure adequate linkage between the protocol and paragraph 5, U.S. Article V: namely, to insert the words "within the framework of" after "the Contracting Parties agree that". In reply to a German question, the U.S. side stated that their suggestion was based on a necessary consideration from the viewpoint of the U.S. to clarify that aliens, in equal circumstances, would not be granted exemptions exceeding those accorded U.S. nationals; and to stress that no special privilege was being established for the treaty alien.

The Germans asked for additional clarification as to the intent of the U.S. proposed insert and noted that in the State of California security for costs and judgment was imposed on a non-resident immaterial of his nationality or his holding of property within the jurisdiction of the court. Concluding that the property test was not applicable in California, the U.S. version would have to be interpreted to mean that a German national, though holding sufficient property in California but

residing in Germany, would be subjected to the posting of security. The U.S. side countered that they were not familiar with the California practices and that security requirements varied among the States. They stressed, however, that it was out of the question for the U.S. Government to submit a treaty to the Senate containing a special privilege for foreign nationals not available in the U.S. in like situations to U.S. citizens.

The Germans commented that they had assumed the exemption to be applicable on the basis of the property test to their advantage. They held that acceptance of the U.S. proposed insert would result in unilateral disadvantages for Germany, since, in view of German past experiences based on the reciprocity clause of section 110 of the German Civil Code, only residence criteria were being followed in the United States. They were regretfully prepared, however, for political reasons, to support the U.S. suggestion before their superiors.

The U.S. side replied to this last remark by emphasizing that no special privileges or favors were being asked; and that the U.S. sought the provisions of a treaty of friendship on the theory that they were mutually

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beneficial. They remarked that their proposal would not become an unbalanced provision solely advantageous to the United States, and in support of this proposition briefly summarized the situation in the United States with respect to security for costs and judgment. In this connection, they stated that 53 independent jurisdictions existed of which some might

not give the desired benefits but some others might grant a better treatment to German nationals under the treaty than was accorded them at present. They referred to those States which under their laws required aliens to post security regardless of their residence or holding of property and stressed that the alienage test would be overcome by the treaty. They added that while perhaps exact reciprocity might not be achieved everywhere, in some States considerable advantage would result for Germans under the treaty. They noted that some States granted more with respect to security for costs and judgment to German nationals than U.S. citizens obtain in Germany, and argued that an overall balance would probably be achieved if all benefits and disadvantages were properly compared. They confirmed that the U.S. position was that a German holding property in a given State would be exempted from posting security for costs and judgment only if holding of property was likewise considered a reason for exemption for a U.S. national. They added that the procedural provisions of some States considered the holding of sufficient property reason for granting exemption from posting cash or a bond as security. In this connection, they stated that whether or not the holding of property was considered technically to be a ground for "exemption" from security might be a matter of definition of terms, for the provisional attachment of the property pending outcome of the litigation might of itself be regarded as a posting of security. The U.S. side handed the Germans, for their information a brief informal summary, prepared by Mr. Houston S. LAY, copy of which is enclosed.

The Germans requested the U.S. side to draft a counter-proposal to be discussed at the next meeting, and agreed in the interim to raise the principles with their superiors in order to obtain advance clearance.

Pauper's Right

A preliminary discussion was then held on the pauper's right.

The Germans proposed that consideration should be given to granting the pauper's right on the basis of reciprocity provided the national of the other Party was domiciled or had his permanent residence within the jurisdiction of the court.

The U.S. side asked whether the pauper's right would be granted in Germany to a destitute seaman who was not domiciled there, but merely a transient, yet wanted to go before a German court in order to recover wages or damages for injury suffered while in port. They commented that in the United States a seaman, irrespective of his nationality or domicile, would be granted the pauper's right in Federal courts if his suit pertained to his profession. They added that under the Jones Act seamen could take personal injury cases arising out of their employment into Federal courts;

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and that there was an exception in favor of seamen from the general Federal rule that suits in forma pauperis were restricted to citizens. With respect to State courts, they explained that the different laws varied. They stressed that the U.S. proposal would provide for national treatment in the pauper's right regardless of contrary Federal or State statutes; and thus would automatically establish the reciprocity required by German legislation.

The Germans commented that their final position regarding the granting of pauper's right for seamen would have to be reserved since it was a novel concept for them to have two courts apply different provisions, specific mention being made of the Federal district court of New York granting the pauper's

right to a seaman irrespective of the $3,000 limitation, whereas a New York State court might not grant this right. The German side continued that the pauper's right could not be considered in Germany under section 114 of the German Civil Code on a case by case reciprocity basis in contrast to the provisions applicable for the exemption from security for costs and judgment; and added that the pauper's right was not at present in general available to Americans since all cases involving litigation of an amount exceeding $3,000 could be transferred from the State to Federal courts where, except for seamen, U.S. nationality was a determining prerequisite, and the German authorities accordingly looked solely to the Federal rule in determining whether reciprocity existed. They explained that seamen presented a special situation, since seamen could bring cases involving payment for wages before a special labor tribunal where decisions were rendered free of charge. They noted that usually Union officials represented the plaintiffs before such labor courts and that lawyers were only admitted in cases where the value in dispute exceeded DM 600.

Both sides agreed to continue the discussion in the next Sub-Committee meeting scheduled to be held on March 9.

[Signed]
Carl H. Boehringer
Commercial Attache
Commercial Attache Division

Enclosure: [Initialled]

Informal summary

Coordination:

[Initialled]
Mr. Herman Walker, Jr.
OGC—Mr. S.H. Lay [Signed "S.H. Lay"]

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From HICOG BONN

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Costs; and Pleadings in Forma Pauperis

Statutes in the U.S. relating to security for costs vary as to particular types of pleadings and as to jurisdiction. Many pleadings in the Federal cou' s where jurisdiction is based on diversity of citizenship follow the rule of the State law, although at least one Federal District has its own rules on the subject. Wherever the subject matter is covered by Federal legislation such legislation, of course, prevails. A detailed analysis of the laws of each State and each Federal district would be too lengthy for our purposes and the most valuable explanation is a rather abbreviated statement of the more general practices.

In numerous instances, security for costs may be required regardless of citizenship, residence or property. In other cases, security may be required on the basis of residence outside the jurisdiction of the court regardless of citizenship, legal domicile or property location. In these jurisdictions an alien receives the same consideration as does a citizen. That is, if the alien is resident within the jurisdiction of the court, no security for cost is required. In other jurisdictions, the fact that a plaintiff is an alien is cause for demanding security for cost regardless of residence or property qualifications.

It would appear that in many jurisdictions, a corporation is assimilated to the status of a natural person although where there is a difference, it is usually in favor of requiring a corporation to give security for cost where a natural person would not be so required. Although there are many differences in the various U.S. jurisdictions on the question of security for cost, the Germans would acquire valuable rights under Article V and the protocol as proposed in the U.S. version of the FCN treaty.

State and Federal procedures in connection with pleadings in forma pauperis are equally divergent although here there appears to be a decided tendency to give the benefit only to citizens or residents and to exclude from the benefits aliens. In this connection, 28 USC, 1915 is of particular interest. In the Federal courts, citizenship is a basic qualification required to allow a plaintiff to commence a proceeding in forma pauperis.

Dr. Paulig had made reference to 28 USC, 32, (undoubtedly intended 28 USC 832) which has been incorporated into Section 1915. Under Section 1915, it is doubted that a corporation could qualify as a "citizen" to commence action in forma pauperis. 28 USC 1916 provides that seamen may commence action for their own benefits for wages or salvage or the enforcement of laws enacted for their safety, without prepaying fees or costs or furnishing security therefor. It does not appear that seamen need be citizens of the U.S. in order to take advantage of this section.

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Exhibit 11*

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AIR POUCH Priority	UNCLASSIFIED (Security Classification)	DO NOT TYPE IN THIS SPACE 611/62a4/3-1854

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FOREIGN SERVICE DESPATCH

FROM: HICOG BONN [circled] Desp. No. 2529

TO: THE DEPARTMENT OF STATE, WASHINGTON Date March 18, 1954

REF: OURDES nos. 1355, October 28, 1953; 1372, October 30, 1953; and 2501, March 16, 1954

18 For Dept.	ACTION E-4	I DEPT. N Rep-2, DC-2, GER-4, OLI-6, L-2
Use Only	REC'D 3/26	F OTHER O CIA-5, COM-8, FCA-10, TR-3

[Comment: all entries in above grid are handwritten.]

SUBJECT: New Treaty of Friendship, Commerce, and Navigation: Report on March 16, 1954, Meeting with German Negotiators

* Comment: Two different copies of the first page of Exhibit 11 were furnished by the State Department. The second copy begins on page 184a, *infra*.

The 32nd regular business meeting for negotiation on the subject matter was held at the Foreign Office on March 16, 1954. Dr. BECKER, as usual, served as chairman of the German team which included representatives of the Foreign Office and the Ministries of Economics, Justice, Labor and Interior. The U.S. side included Messrs. BOEHRINGER, LEVY, and WALKER.

The meeting on March 16 was devoted to a detailed discussion of U.S. Article VIII on employment, professions, and non-profit activities, and U.S. Article IX on property rights.

Article VIII, Paragraph 1

The Germans stated that their preference remained to delete this paragraph, as being unnecessary, but that they were prepared to accommodate U.S. wishes for its retention in the treaty. They felt it to be in general acceptable as drafted, subject perhaps to linguistic clarifications and verification of their understanding of its intent. They had some questions to ask, in response to which the U.S. side developed answers as follows during the course of the discussion:

(1) The first sentence is of a general nature, being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel. Its major special purpose is to preclude the imposition of "percentile" legislation. [Comment: the foregoing sentence is underlined by hand]. It gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law. The Germans said they might wish to suggest some linguistic revisions to clarify this last point. The U.S. side said they did not feel that further clarification was essential, especially as the juxtaposition of the contrasting wording of the first and second sentences gives clear clarification by implication; but declared their willingness to consider any reasonable proposal, in deference to German

views. No express clarification had been necessary in any other treaty, to the best recollection of the U.S. side.

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Exhibit 11

[Second Copy of Page 1]

AIR POUCH Priority	UNCLASSIFIED *(Security Classification)*	DO NOT TYPE IN THIS SPACE [handwritten nos. "611.62a/3-1854" appears in box.

FROM: HICOG BONN

2529
DESP. NO.

TO: THE DEPARTMENT OF STATE, WASHINGTON March 18, 1954
DATE

[Comment: Handwritten nos. with illegible writing appears under "TO" entry]

REF: OURDES nos. 1355, October 23, 1953; 1372, October 30, 1953; and 2501, March 16, 1954

18 For Dept. Use Only	ACTION E-4 REC'D 3/26	DEPT. I N REP-2, DE/R-2, GER-4, OLI-6, L-2 F OTHER O CIA-5, COM-8, FOA-10, TR-3

[Comment: all entries in above grid are handwritten.]

SUBJECT: New Treaty of Friendship, Commerce, and Navigation:
Report on March 16, 1954 Meeting with German Negotiators

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clear clarification by implication; but declared their willingness to consider any reasonable proposal, in deference to German views. No express clarification had been necessary in any other treaty, to the best recollection of the U.S. side.

RN Levy/igl [initialled by hand]
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(2) The second sentence deals with a special and limited situation, and within its framework goes beyond the first sentence, inasmuch as it waives professional qualification requirements in the cases stipulated. These have to do with temporary jobs requiring special skills (e.g., for an American firm, competence in American law and accounting methods) for internal management purposes; and no right is created to engage in the general practice of a profession in the host country. In reference to the question of entry into the country, necessary entry privileges are implied. With specific reference to the needs of a German firm in the United States, procedures are understood to be available whereunder temporary visas can be issued in properly justified cases.

(3) The word "moreover" introducing the second sentence is merely a convenient connective, and has no special substantive significance. The Germans said that it did not carry over very well into German; and it was agreed that it be translated as jedoch in the German text.

(4) It was agreed to frame the first sentence in a manner similar to that agreed on for Article VII, paragraph 1, to wit:

> "Nationals and companies of Germany shall be permitted to engage within the territories of the United States of America, and reciprocally nationals and companies of the United States of America shall be permitted to engage within the territories of Germany, accountants . . . . et cetera."

Article VIII, Paragraph 2

It was agreed, as in the case of the preceding paragraph, to reframe the first sentence along the following lines:

> "2. Nationals and companies of Germany shall be accorded within the territories of the United States of America, and reciprocally nationals and companies of the United States of America shall be accorded within the territories of Germany, national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities, and shall be accorded the right to form associations for that purpose under the laws of the country. . . ."

Article IX

Dr. von SPRECKELSEN from the Justice Ministry, who acted as principal technical spokesman for the German side, commented that some legal difficulties had arisen which had not been considered during the earlier discussion of U.S. Article IX in October, 1953 (see reference despatches)

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which required additional explanation. He noted that these difficulties pertained to existing German legislation with respect to the acquisition of real property by alien natural persons and by alien juridical persons "residing abroad".

Acquisition of Realty in Germany by Alien Natural Persons

The German side noted that limited restrictions only were applicable regarding the acquisition of real property by alien natural persons and that these curtailments were based not on Federal but on old Laender legislation applicable in Hamburg, Hesse, and the part of the Rhineland-Palatinate which formerly belonged to Hesse.

They explained that in the above-cited Laender the acquisition of real property by alien natural persons depended on authorization granted by the Land authorities and that the purchase contract could not be fulfilled until the required authorization had been obtained. They noted that the date of the purchase contract became valid for the acquisition once the authorization had been accorded, but that the purchase contract was voided if the required authorization were denied. They added that the acquisition of real property by alien natural persons was subjected to such an authorization not only in cases of acquisition by contract but also in instances of acquisition by intestate or testate succession. They stressed that the existing provisions were being liberally applied, and that reciprocity treaties had been in the past concluded by Germany with other countries which waived the authorization require-

ment if likewise the countries concerned did not impose restrictions for the acquisition of real property by German nationals.

Acquisition of Realty by Alien Juridical Persons Residing Abroad

Dr. von Spreckelsen observed that for the acquisition of real property by alien juridical persons residing abroad practically all Laender required the granting of an authorization before a purchase contract became valid. He stated that the Laender applied the provisions on a liberal basis, and that old German treaties had renounced the application in case other countries had been prepared to grant reciprocity to German juridical entities.

He concluded that in view of these existing requirements it was difficult for the German side to accept paragraph 2 of U.S. Article IX, and asked whether the United States had ever granted natural and juridical alien persons in the United States national treatment as a treaty right.

The U.S. side reviewed U.S. treaty policy on this point and noted that only the 1853 treaty with Argentina provided for national treatment with respect to acquisition of title to real property, and then only in the case of natural persons. They added that the treaty with France

originally negotiated about 100 years ago had contained a similar provision but had been rejected by the Senate as

constituting undue interference in State rights; and that the policy of the Federal Government for years had been to abstain from interfering with State regulation of land ownership. They stated that the present text of paragraph 1, U.S. Article IX, which granted national treatment with respect to the leasing of land needed for treaty purposes without according a similar right for the holding of land by title, represented an internal U.S. compromise on the question of how far alien land tenure should be the subject of treaty commitments.

They stressed that the present text granted the greatest advantages for practical treaty purposes and added, with respect to clause 1 (b), that many States did not have discriminatory provisions in their legislation. In this connection, they noted that half the States had no disability laws, and perhaps 15—18 other States had variously slight or partial disability provisions, such as South Carolina and Pennsylvania which applied acreage limitations of a rather mild sort; Nebraska, which permitted full ownership inside municipalities but not in rural areas; and Wisconsin which prevented large scale holding of farmland by aliens by imposing acreage limitations in rural areas. They added that only seven or eight States had severe disability laws as to alien tenure. They concluded that, accordingly, an alien would for the most part be accorded either national treatment or very liberal treatment in the United States with respect to matters of treaty concern, and that the U.S. proposed language granted de facto reciprocity since any German Land could withhold rights to a U.S. natural or juridical person seated or domiciled in a State which imposed restrictions on Germans.

The U.S. side noted that the issue of property rights by treaty was sensitive in the United States; and also that the proposed text placed the responsibility for any right withheld from a U.S. national abroad on the States which maintained disability provisions in their law, and gave the legislatures concerned a practical occasion for reviewing the need for

maintaining disabilities which had been first adopted long ago when conditions were different.

As to the enforcement of alien disabilities in the States, they said that no known permit system had been established and that the disability clauses were typically latent legal provisions that allowed the alien to take title good as against all the world except the State itself. As a consequence, they stated, an alien could buy land, use it, and in the typical jurisdiction have this right challenged only by public authority through the writ of office found. They explained that this ancient writ was often subject to limitations; in Minnesota, for instance, if the Attorney General of the State did not challenge the alien's right within a specified number of years, the title became immune to challenge. They concluded that, although paragraph 1 contained a reservation, its effects were normally of small consequence since there existed a large degree of alien ownership either by virtue of liberal laws or practical toleration.

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UNCLASSIFIED
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From HICOG BONN

The Germans countered that insofar as Germany was concerned sentence 2, paragraph 2 conveyed an apparent but not a real reciprocity since they had no federal law which afforded a possibility to prohibit U.S. nationals to own land. They added that the lack of comprehensive laws to apply the treaty provisions for natural persons as distinct from juridical persons, from whom restrictions existed in practically all Laender, would make paragraph 2 meaningless. Referring to paragraph 4, U.S. Article IX, they observed that under the German

license system the authorization, once granted, could not be revoked and that these considerations made it difficult for them to accept the U.S. formulation in paragraph 2.

The U.S. side answered that paragraph 4, U.S. Article IX, was a practical commitment to safeguard the alien against enforcement of the old common law theory under which he had no heritable blood, and its European counterpart the droit d'aubaine. They added that the five year period allowed the alien to sell his property at a full market price and thus protected him against spoliation or sacrifice sales. Regarding sentence 2 of paragraph 2, they stressed that it contained a latent reservation only, and that there was no problem in Germany since the treaty did not wish a country to worsen its laws but sought only to establish minimum rights. They explained that in accordance with its provision a Land could deny an authorization if similarly a State had a disability law and that on the other hand, a Land would grant the authorization automatically in case no State disability law existed. If a Land, however, did not in absence of the treaty impose an alien disability, the treaty most certainly would not in any way oblige it to change its system.

The German side countered that Article IX was the only Article in the present treaty with a marked and unbalanced reciprocity provision; and they suggested that paragraph 1 be redrafted in a mutual manner to parallel the other treaty provisions, and that paragraph 2 be deleted.

This German suggestion was followed by a further discussion of the merits of the U.S. proposal, which was answered by a German assertion that they feared that the U.S. draft might provoke political difficulties for the treaty. Its conspicuous difference from the way the treaty generally was set up would necessitate justifications in detail before parliament at the time of ratification; and they were not confident that they could give explanations that would readily allay suspicions in the Bundestag and Bundesrat. They feared that maintenance of the

U.S. proposed text might, therefore, prejudice early and harmonious ratification.

At this point, Dr. Becker being temporarily called from the room, the discussion digressed to the following three questions asked by Dr. von Spreckelsen:

(1) With respect to clause 1 (b) whether the words "other rights" included mortgages, or what, stressing that in Germany restrictions were applicable for only acquisition of real property.

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(Classification)

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The U.S. side replied that a sure treaty right being only accorded under clause (a), the words "other rights" had been used on purpose to cover everything not in (a) falling within the scope of the concept "tenure of property".

(2) The second German question was whether it would be possible to stipulate sure treaty rights in those States whose laws made specific exception for treaty rights, specific mention being made of Missouri. In reply to that question, the U.S. side stated that, aside from the fact that the Missouri law, at one time at least, apparently pertained only to treaties existing at the time the law had been enacted, they felt the treaty had to be geared to the situation existing in the "hard core" group of States.

(3) The third German question pertained to the phrase "acquiring through judicial process" in paragraph 4. They

asked whether this phrase was designed to cover a change of ownership as a result of sale of property under execution in case a mortgage on such property had not been repaid. They further went on to say that in Germany alien and German alike would not become the owner of a property by mere purchase contract, but only after finalization by a contract of transfer (Auflassung). If a purchase contract was not fulfilled, suit could be brought against the seller. They asked whether such a law suit was also meant to be covered by the words "judicial process".

The U.S. side replied that if the reason for failure to fulfill the purchase contract was not due to interference by public authorities but solely based on willful and personal action of the seller, they did not see offhand the relevance of the latter question, though they would not hazard any final opinion. They suggested that Dr. von Spreckelsen was better qualified to analyze such a question; and they noted that their own legal counsel was unfortunately unable to attend today's session. They stated that though primarily the words "judicial process" had been motivated by a desire to cover mortgage foreclosures, wording had been chosen broad enough to cover other cases wherein a legal interest in property might be established by judgment of a court; for example, attachment in satisfaction of a debt other than a mortgage; enforcement of a dower right; or the property settlement growing out of a dissolution of marriage in a community property State. Dr. von Spreckelsen said that he would probably offer some language designed to clarify the term "judicial process", which was not a term that would be easily understood in Germany.

Conclusion

Dr. Becker reverted to his proposal that paragraph 1 be mutualized, and paragraph 2 deleted. He stated that he wanted to stress that notwithstanding the resultant narrowing of the scope of the treaty provision, U.S. citizens and companies could rest assured of being accorded liberal treatment in

Germany, in keeping with the basic purposes of the treaty to

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promote friendly intercourse and encourage broader business relations. He did not foresee that Americans would experience any difficulties in getting the property they might need in future.

It was finally agreed that the U.S. side would submit a redraft in compliance with Dr. Becker's proposal, and recommend it to the Department. The U.S. side stated, however, that they would be most happy to revert to the original U.S. proposal, if later after further consideration the Germans concluded that it would be feasible from the parliamentary viewpoint.

The redraft in question was prepared and handed to the Germans on March 17, copy enclosed.

[Signed]
Carl H. Boehringer
Commercial Attache
Commercial Attache Division

Enclosure:

[Initialled]

Suggested Redraft,
Article IX, paragraph 1

Coordination:

[Initialled]

Mr. Herman Walker, Jr.

Copies to:

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[End of page]

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Encl. No. 1
Desp. No. 2529
From HICOG BONN

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Page ___ of
Desp. No. _____
From _____

March 17, 1954

Suggested Redraft
ARTICLE IX, Paragraph 1

1. Nationals and companies of either Party shall be accorded within the territories of the other Party: (a) national treatment with respect to leasing land, buildings and other real property appropriate to the conduct of activities in which they are permitted to engage pursuant to Articles VII and VIII and for residential purposes, and with respect to occupying and using such property; and (b) other rights in real property permitted by the applicable laws of such other Party.

(Omit present paragraph 2, and renumber succeeding paragraphs)

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Exhibit 12

[Seal] [LETTERHEAD OF THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA]
Address official communications to
Office of the United States
High Commissioner for Germany
Office of Economic Affairs,
Commercial Attache Division,
Mehlemer Aue, Box 890,
Bad Godesberg
April 29, 1954.

The Honorable
The Secretary of State,
Washington, D.C.

Sir:

In connection with the negotiation of the new Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, certain third person notes, containing information from the Department on specific articles of the United States standard draft treaty and of the German draft treaty, were sent by the office of the United States High Commissioner for Germany to the Ministry of Foreign Affairs, Bonn, during the course of the discussions which took place at Bonn. Following is a complete list of these notes, copies of which have been sent informally to the Department:

Date of Note	Subject Matter
November 2, 1953	U.S. Article IV
November 4, 1953 (1st note)	U.S. Article I
November 4, 1953 (2nd note)	U.S. Articles II & III
November 5, 1953	U.S. Article VI
November 12, 1953	U.S. Article II
November 23, 1953	U.S. Article V

December 9, 1953		U.S. Article VII
December 10, 1953		U.S. Article V
December 12, 1953		U.S. Article VI
December 14, 1953		U.S. Article IX
December 15, 1953		U.S. Article VIII
December 16, 1953	(1st note)	U.S. Article X
December 16, 1953	(2nd note)	German Articles 6, 7 & 8
February 5, 1954		U.S. Article III
February 8, 1954		U.S. Article II
February 9, 1954		U.S. Article XI

Respectfully yours,

[Signed]

Carl H. Boehringer
Commercial Attache

[Comments: Stamp "Filed May, 10 1954" on right side margin; stamp "611.62A4/4-2954" appears sideways on right of page; stamp "CJC" appears sideways on lower right of page; handwritten nos. "611.62a4/4-2954" appear sideways at bottom right of page; handwritten no. "62" appears on lower left of page.]

Note Dated November 2, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Foreign Office of the Federal Republic of Germany, and has the honor to refer to discussions which took place on October 8, 1953, in the Foreign Office between representatives of the German and United States Governments regarding Article IV of the United States draft treaty on friendship, commerce and navigation.

It will be recalled that, inter alia, the German negotiators presented to the United States negotiators a revised version, in German and in English, of Article IV. The German negotiators also requested information regarding the meaning and intent of Article IV, as it appears in the U.S. draft treaty, and raised other points on which information was desired.

In accordance with instructions from the Department of State, this Office is now in position to transmit the Department's views with respect to the various points raised at the October 8 discussions.

Article IV has been drafted against the background of American law; in its present form it is calculated to assure German nationals effective rights in the United States as to the matters it covers. The Department desires, of course, that it also provide an assured base of equivalent rights for American nationals in Germany. Therefore, although the German counter-proposal for a revision of Article IV is not considered to be a satisfactory substitute for the Department's proposal, the Department concurs in the evident German purpose of arriving at language that will fit the Article adequately to the German social security system.

Speaking broadly, there are in the United States the following major categories of what may for present purposes be called "so-

cial security" systems: (1) workmen's compensation; (2) local welfare and relief programs; (3) federal old age and survivors insurance; (4) federal-State unemployment compensation; and (5) federally-aided State programs of public assistance to needy who are aged, blind, or permanently and totally disabled, and for dependent children. The

Department's

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RESTRICTED -2-

Department's proposal as set forth in Article IV, deal with (1), (3) and (4), and represent the extent to which the United States is now prepared to enter treaty commitments. The United States Government has not been prepared to enter treaty commitments with respect to (2) and (5), since it has been deemed expedient to leave these two categories under State and local jurisdiction without interference from treaties negotiated by the federal government.

Paragraph 1 of Article IV deals with category (1); and paragraph 2 deals with categories (3) and (4). There is no overlap; the two subject matters are quite distinct. The first is a matter regulated by the States. It deals with the rights of a workman and his family to compensation for bodily damage suffered at work or in consequence of his work—the award of compensation being made according to a fixed scale of payments through an administrative procedure designed to save the injured party the hazards, delays and expense of litigation and to preclude the common-law defenses of contributory negligence, assumption of risk and fellow-servant rule traditionally available to the employer in a suit of law. Article II of the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, which in turn elaborated on a provision negotiated with Italy in 1913, inaugurated the United States treaty policy with respect to this matter. The present wording is designed to clarify certain ambiguities in the 1923 wording as respects workmen's compensation, and to take account of experience gained in the

field since that date when the subject was still a fairly novel one in the United States.

On the other hand, paragraph 2, which first appeared in the 1948 Treaty of Friendship, Commerce and Navigation between the United States and Italy, deals with the largely federalized social security system proper. This is a compulsory insurance system, financed on a contributory basis. As the law now stands, the system extends to old-age and survivors benefits, and to unemployment compensation. Clause (a) of U.S. standard draft, however, is so worded that the treaty would also apply to sickness and disability benefits should the law in future be expanded to cover those features. With respect to the question raised by the German negotiators regarding this paragraph, the reference to "test of financial need" is designed to make clear that the system visualized is a true insurance system, whereunder payments are made to the recipient as of right and without regard to his financial circumstances, as distinguished from a relief system whereunder the recipient is given something as an act of charity in accordance with his need (i.e., a "means test" is applied).

The Department supports the position taken by the American negotiators to the effect that generic language sufficiently broad to insure

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to insure the treaty's adaptability to future changes in the details of legislation is eminently desirable in a broad-gauge instrument of this type which is designed to endure for an indefinite period and which should preferably deal in terms of general principle. At the same time, the Department observes that the language should be sufficiently specific that all interested parties, including municipal bodies where involved, can ascertain their major rights and obligations under the treaty. One of the reasons for revising the 1923 provision in reference to workmen's compensation was, indeed, to find language that would readily apprise

interested State officials of what was expected of them under the treaty.

It may be noted, further, that in contrast to the German counterdraft (last clause, paragraph 2), the U.S. draft does not subject the national treatment principle to any residence or domicile qualification. The intent is not to rule out the possibility of residence or domicile tests, but to assure that any such tests, where they exist, shall be imposed in the same manner upon the citizen and the treaty alien alike, to the end that there be fully equal treatment in equal circumstances.

The Department concludes that, pending further exploration in light of German legislation and of the reasons underlying the U.S. draft, there does not appear to be anything more of consequence which it can usefully add at this time, except to observe that Article IV is not an indispensable element of the treaty's major objectives, from the U.S. viewpoint. It has been developed in large part in deference to the wishes of other countries, and, as a practical matter, redounds on balance more to the advantage of aliens in the United States than of Americans abroad. It has been retained in the U.S. standard draft in the interests of uniformity of approach, and of having a well-rounded document concerned with all elements of the population.

Copy to:

EU:GER:GEA
E:OD
PA:OD
OGC—Mr. H. S. Lay
E:FNP

U.S. High Commissioner for Germany
Bonn, November 2, 1953

CHBoehringer/gl November 2, 1953 (Original initialed CHB)

First Noted Dated November 4, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Foreign Office of the Federal Republic of Germany, and has the honor to refer to its note of November 2, 1953, containing comment from the Department of State regarding Article IV of the Department's standard draft treaty of friendship, commerce and navigation.

This Office is now in receipt of further communications from the Department which contain comment on various points raised in the discussions between the German and American negotiators on October 5, 1953.

With reference to the question regarding the present sovereignty status of Germany in relation to the treaty, which was raised by the German negotiators, the Department is inclined to believe that there would be occasion for special clarifying provisions only if, and to the extent that, the German Government would, under the existing and the EDC regime, have difficulty in complying with one or more of the specific commitments agreed to in the treaty, or if some particular provision (e.g., Article XXIII on territorial application) is not adequately phrased from the viewpoint of Germany's situation. That is, determination of the answer to the question raised by the German negotiators would appear to depend on whether specific elements in the content or wording of the treaty creates special problems for Germany. The Department does not, at this early stage of the proceedings, envisage such problems. However, the German negotiators are invited to cite and define any that they may detect as the detailed examination of the treaty proceeds.

Regarding the discussions on Article I, it will be recalled that the German negotiators advanced the thought that this Article is

designed to have declaratory value and to set forth the major principles and objectives of the remaining part of the treaty. In the Department's opinion, this supposition is partially correct, for the Article is in part calculated to form a link between the preamble and the main body of the treaty and as such to emphasize the broad scope of the treaty and to characterize in summary language the purpose of fair dealing underlying its more detailed provisions. It has also, however, two other interrelated objectives,

namely:

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namely: (1) to suggest a general policy of liberal, rather than of narrow, construction of the provisions of the treaty; and (2) to afford a guiding principle to which resort may be had in situations where no specific rule of the treaty is applicable or in reference to which the specific rules of the treaty do not provide an adequate standard of treatment. (For example, a given governmental measure may technically comply with the legal rule of national treatment, yet be so arbitrary and so burdensome in its impact on the foreigner as to be grossly unjust. A process of superficially objective "classification" is one device available, in certain situations, for singling out the foreigner for harrassment without breaching the letter of the national treatment rule.) The latter objective constitutes perhaps the major justification for the Article.

The Department, in choosing the words "persons, property, enterprises and other interests of nationals and companies", had in mind broad coverage encompassing the entire range of the treaty, for it is not believed that there is any topic alluded to in the treaty which is not referrable to one or more of the words of this recitation, liberally construed. In this connection, this Office has been instructed to inform the German negotiators that, should they feel that this recitation is not as adequate as it might be, the

Department would be glad to consider any revisions they may wish to suggest, so long as the wording remains general and brief.

The German proposal to insert the words "fair and" before "equitable", so that in translation the phrase would read "gerechte und billige", is acceptable to the Department.

The Department is inclined to doubt the desirability of adding a paragraph concerning the specifically "friendship" aspects of the treaty. The Department has not in its post-war treaty program followed a policy of including such a paragraph. While there are two exceptions, to be found respectively in the treaties with China (1946) and Ethiopia (1951), in these cases there existed special considerations not believed applicable in the case of Germany or of European countries generally. The discussions with China commenced while the war in which the two countries were allied was still in progress; and, moreover, such a paragraph reflected a rather traditional idea in treaty relations with China, the omission of which might have been taken amiss at the time. In the case of Ethiopia, the instrument negotiated was not a standard FCN treaty, but a specially abridged and adapted version broadened in scope to include material on diplomatic and consular relations, and formulated with regard to circumstances and past experience peculiar to Ehtiopia. [sic]

The

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The Department's theory has been that the friendship in the treaty consists in the fact that the two countries undertake to enter into such a broad-gauge and liberal charter of relations, which betokens good neighborliness of a high order and which necessarily implies mutual sentiments of cordiality; and that any express references to friendship might most appropriately be the concern of the preamble. The word "Friendship" in the treaty's title is retained for traditional reasons, as the trilogy "friendship-commerce-navigation" is consecrated by usage in connection

with this sort of instrument. Except for this traditional association, the word "friendship" might be construed to carry overtones of military and political alliance outside the intent and purpose of the treaty, an essentially economic document which might more accurately be described as a treaty of "establishment, investment, commerce and navigation". One of the reasons for avoiding specific provisions on "friendship", therefore, has been to obviate misinterpretations of the purpose and nature of the instrument. Another reason has been that a paragraph on "friendship", being merely hortatory and sentimental in character, would appear to be out of keeping with the principle that the numbered provisions of the body of the treaty should insofar as possible lay down rules of law, that is, specific standards capable of affording definite guides to behavior in concrete situations.

If it is found inappropriate to add a "friendship" paragraph, there would, in the Department's opinion, hardly appear great need for the suggested third paragraph on freedom of commerce and navigation, as proposed by the German negotiators, insofar as the suggestion has been motivated by a desire to achieve balance in form. The Department is inclined to believe, indeed, that a two-paragraph article in the form suggested would be asymmetrical. Apart from considerations of form, however, the Department perceives a possible serious objection of substance to this suggestion. In the standard U.S. draft, a provision on freedom of commerce and navigation introduces the treaty's provisions on shipping (Article XIX), its traditional association, and it is consequently presumed to have its significance in connection with the ship traffic. If this provision were transposed to the head of the treaty, so as to preface all that follows (including Article XIV), it would appear, inter alia, to imply "free trade" commitments with reference to the international goods traffic beyond what the United States (and perhaps Germany also) is prepared to undertake. While, therefore, the Department does not wish to assume the arbitrary posture of denying that there is any way in which Article I can be acceptably expanded, the particular suggestion advanced by the German negotiators does not appear to be feasible. The possibil-

ity exists, of course, that the German negotiators may wish to formulate alternative suggestions for consideration.

Additional

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Additional comment on other points raised at the October 5, 1953 meeting will be given in supplementary notes from this Office.

U.S. High Commissioner for Germany

Bonn, [Comment: "December 16" crossed out and handwritten "November 4" inserted] 1953

Copy to:
EU:GER:GEA
E:OD
PA:OD
OGC—Mr. H.S. Lay
E:FNP

E:CAD:CHBoehringer:maa
Tel. Mehlem 3265/66 (Original initialed CHB)

Second Note Dated November 4, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Foreign Office of the Federal Republic of Germany, and has the honor to refer to its first note of November 4, 1953, containing comment from the Department of State regarding various points raised in the discussions held on October 5, 1953, between representatives of the German and United States Governments, in connection with the proposed treaty of friendship, commerce and navigation between the two countries.

This Office is now in position to make available to the Foreign Office the Department's views regarding the exchange of views which took place with respect to Article II of the U.S. standard draft.

With regard to the question raised by the German negotiators about "a substantial amount of capital", as used in Article II(1)(b) of the standard draft, the Department states that this term has yet to be authoritatively interpreted. As the treaty investor clause is an innovation and no cases have arisen under it, there is no body of precedent which can be drawn upon for this purpose. In common with the rest of the clause, determination of the exact scope of the term in all situations must wait until a body of experience has built up through interpreting and applying it in specific cases from time to time in the future.

However, some concept of the intended meaning of the term may be derived from the origin and objectives of the treaty investor clause as a whole. The clause initially was proposed with the view of encouraging the international flow of investment capital. Specifically, the intent was to further this objective by facilitating through treaties the entry and indefinite sojourn of persons who wish to engage in worthwhile investment activities in the United

States but were eligible only for temporary business visitor's visas because their activities did not constitute international trade within the meaning of clause (a), relating to treaty traders. In developing the investor clause and obtaining its acceptance by the appropriate Congressional bodies, particular attention was given to assuring that the clause, if enacted into law, would not become a device to

permit

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permit individual aliens to circumvent other provisions of the immigration laws. The concern was basically that the investment on which the granting of treaty investor status was based would be genuine and significant. Possibilities of abuse were foreseen through fictitious or dummy operations, small individual investments (e.g., in over-crowded segments of the petty retail trade) cloaking an attempt to evade the quota, and speculative ventures undertaken as a pretext for obtaining entry for other purposes.

So far as the Department is aware, the specification by Congress of criteria for eligibility to treaty status was influenced mainly and perhaps exclusively by considerations of preventing abuse or evasion of the immigration laws. Substantiality of investment may be viewed in light of this aim; and similarly such corollary tests as the actuality, and the enduring character of the investment. So far as is known to the Department, Congress did not frame the treaty investor section of the Immigration and Nationality Act with the intention of discouraging particular types of investment or of excluding small investments. What constitutes a substantial investment is a relative matter, depending upon the pattern of investment, the prevailing type of organization and other conditions within the industry in which the individual investment is to be made. One factor would be whether the size and character of the individual investment are such as reasonably to require the immediate personal attention of the owner

or controller. Size alone, measured in monetary terms, would not necessarily be the decisive factor. A relatively small commitment in terms of dollars might constitute a substantial investment if made in an enterprise engaged in certain technical processes serving a limited market, and where the ratio of necessary technology and skill to capital is high, as, for example, the grinding of special types of optical lenses or the cutting of diamonds. On the other hand, the substantiality of an investment consisting solely of an inconsequential fractional interest in a large and heavily capitalized enterprise would obviously be open to question under clause (b). Similarly, the investment of a small sum in a common small-scale occupation (e.g., a corner grocery store, gasoline filling station, or a one-man farm) suggests that the prospective "investor" be considered ineligible under clause (b), as he properly should be seeking entry as an immigrant under the quota.

Regarding Article II in the U.S. standard draft, the scheme advanced by the German negotiators that the "cultural" parts of the treaty, as they may be found from time to time in the draft, be segregated and dealt with in separate articles is, according to the Department, not unprecedented or on its face illogical. However, if extensively carried out, it bids to run into complications and could materially increase the wordage of the document needlessly.

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The introduction of religious, scientific and educational activities at this point, in accordance with the German proposal for reorganizing paragraph 2 of the Department's draft, illustrates this. The endeavor to provide full coverage for these activities at this point leads logically to providing for property rights in connection with them. But a rule on property cannot, from the United States viewpoint, be so summarily written as in the German counterdraft. Property is a special subject requiring some

space to deal with properly, in view of the U.S. federal system. It has therefore been found convenient and economical to gather all the material on property into one Article (IX). Thereby, lengthy repetitions are avoided. Again, if a full treatment of these activities is to be undertaken at this point, the question of taxation in reference to such activities would need to be gone into, in addition to the question of property rights. But here also is a question needing some space to treat adequately; and it has proved most convenient and economical to deal with general taxation also in a single Article (XI). Yet again, if activities are to be dealt with fully, there arises the question of the rights to conduct such activities through the medium of corporations and associations, as well as individually. But to provide at this point for this and other pertinent details tends to break the pace of the treaty. Finally, the logical reason for associating "scientific" activities with freedom of worship, in the same paragraph, is not readily perceived; but if scientific activities are not included along with religious, still additional provisions would have to be formulated to achieve the treaty coverage sought.

Altogether, the Department believes that the orderly and efficient approach is to defer the question of "activities" (including "philanthropic" activities, which the Department notes was omitted without explanation in the German counterdraft) until after the matters covered in Articles II through VI of the U.S. draft (being primarily certain basic rights of persons and property), are disposed of.

At this juncture, it might be useful to note the distinction between freedom of conscience and worship, on the one hand, and "religious activities" on the other, as the Department visualizes it. The former concerns the right of the nationals of the one party in the other to believe and practice their own chosen religion, individually and among themselves. The latter encompasses their right to do things that carry them outside the circle of the host country. The former is a fundamental human freedom which should not be subject to any national treatment or most-favored-nation treatment qualification, because so to do would be to rec-

ognize that the treaty alien's individual liberty of conscience, and the manifestation thereof in religious services within the alien community, are

in principle

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in principle subject to repression if the Government chooses to direct and circumscribe the religious beliefs and practices of its own citizens. The qualification to which this freedom may properly be subject is that it be not disorderly, unsanitary or immoral in its practice. The right to engage in religious "activities", however, may properly be framed in a national and most-favored-nation treatment context, which of course obviates the need for any special qualifications as to public health, morals or safety. The two subject matters are therefore separated in the U.S. draft, the former being framed in absolute terms in Article II(2) subject only to the reservations in paragraph 3 of that Article, and the latter being treated in contingent terms in the last paragraph of Article VIII in association with provisions dealing with other types of activities and the ancillary rules applicable thereto.

If "activities" are deleted, the task of adopting the organization suggested by the German negotiators in reference to Article II of the U.S. draft would be greatly eased; and if they wish to revise their counterproposal in light of the relevant Department comments, the Department would be pleased to give it careful consideration. In this connection, reference may be made to the treaty which the United States recently concluded with Greece, in which Article II (except paragraph 2) and III afford an illustration of a comparable approach in another case).

It should be pointed out, by way of concluding comment, that the Department feels the specific material on freedom of communication and reporting (sub-paragraphs (d) and (e) of the U.S. draft) to be a highly desirable part of the treaty, and that the supposed reference by implication to this subject matter in the

second sentence of II(1) of the German counterdraft represents a quite inadequate way of dealing with it.

With regard to Article III of the U.S. draft, it will be recalled that the German negotiators suggested one change and that in paragraph 2, whereby the first sentence thereof would be modified as follows:

> "If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representatives of his country shall be immediately notified unless the person taken into custody objects thereto."

The Department has instructed this Office that it is unable to accept the change made by the German negotiators, because the United States Government cannot confidently undertake that State and local police officials in the United States will automatically notify the appropriate consul when there is an arrest or detention. The

objection

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objection is a practical one, growing out of the fact that law enforcement in the United States is largely in the hands of county sheriffs, municipal police forces, and State constabularies, in literally thousands of different jurisdictions; and there is no machinery or procedure whereby the federal government can effectively issue them instructions. If local officials are aware that they have a legal duty to give such notification, they may be counted on to do so. But the only practicable way the Department has been able to devise for assuring that the necessary knowledge is had by the official needing it, when he needs it, is that set forth in the U.S. standard draft; namely, that the arrested person assume the burden of demanding notification.

For the rest, the idea that an arrested person should enjoy a treaty right to have his consul kept in ignorance seems, in the Department's opinion, to be rather novel. Should the German negotiators wish to support their proposal in this regard, the Department has expressed interest in receiving from this Office a statement containing reasons additional to those expressed by them during the October 5 meeting.

The foregoing concludes the comments from the Department which this Office is presently in position to transmit to the Foreign Office with respect to the matters discussed on October 5, 1953.

Copy to:
EU:GER:GEA
E:OD
PA:OD
OGC—Mr. H. S. Lay
E:FNP

U.S. High Commissioner for Germany
Bonn, November 4, 1953

CHBoehringer/gl
November 4, 1953 (Original initialed CHB)

Note Dated November 5, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Foreign Office of the Federal Republic of Germany, and has the honor to refer to its two notes of November 4, 1953, containing comment from the Department of State regarding various points raised in the current discussions regarding a new treaty of friendship, commerce and navigation between the United States and Germany.

This Office is now in receipt of a communication from the Department, containing comment on the exchange of views held on October 8, 1953, between the German and American negotiators with respect to Article VI regarding protection of property.

The insertion of the phrase "and in accordance with due process of law" after the words "public purpose" in paragraph 4, as suggested by the German negotiators, is acceptable to the Department.

The Department does not, however, look with favor upon the suggested additional paragraph relative to the requisitioning of vessels. In principle the Department believes that a treaty should not attempt to prohibit either Government from taking for paramount reasons private property it may deem necessary in whatever needful contingencies may materialize. To write in such prohibitions would, in the Department's opinion, infringe more on the prerogatives of sovereignty than the treaty ought to attempt, and introduce a futile element of rigidity into an instrument that ought to be sufficiently flexible to permit it to endure in full force and effect over a long period of time. The treaty provisions on the taking of property might most prudently be confined to basic rules that prescribe how the Government goes about a taking.

Specifically, as to the particular case of vessels, the Department would not see advantage in a provision which implied impropriety in the ship seizure policy which the United States or its allies followed in the World War II period; or which purported to commit the United States not to seize ships deemed vitally necessary to its

essential

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essential security in a future war emergency. In such a contingency, in fact, the existence in the treaty of the security reservation (Article XXI, paragraph 1-d) would render the proposed paragraph ineffectual.

The foregoing would appear to conclude the Department's expression of views on matters discussed during the October 8 meeting, specific comment on Article IV of the U.S. standard draft treaty having been communicated to the Foreign Office by means of a note from this Office dated November 2, 1953.

U.S. High Commissioner for Germany,
Bonn, November 5, 1953

Copies to:
EU:GER:GEA
E:OD
PA:OD
OGC—Mr. S. H. Lay
E:FNP

CHBoehringer/gl Nov. 5, 1953 (Original initialed CHB)

Noted Dated November 12, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of November 5, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions regarding a new treaty of friendship, commerce and navigation between the United States and Germany.

This Office is now in receipt of a further communication from the Department of State which contains comment on Article II of the United States standard draft additional to the comment contained in this Office's second of two notes of November 4, 1953.

The Department of State observes that the German counterproposal regarding entry and immigration rights goes much beyond any thing the United States Government can entertain, as it poses serious conflict with the Immigration and Nationality Act which the Department of State is bound scrupulously to observe. The standard draft provision proposed by the Department of State has
been framed in conformity with the provisions of that Act, and indicate the limits within which the United States Government is prepared to undertake treaty commitments.

Assured rights of entry and sojourn are proposed in paragraph 1, clauses (a) and (b) respectively, for two classes of persons: namely, the "treaty trader" (for whom provision was made also in previous immigration legislation) and the "treaty investor" (for whom provision was made for the first time in the Immigration and Nationality Act that went into force on December 24, 1952). Persons eligible according to the criteria which determine who are genuine traders or investors within the meaning of the treaty, and who are individually admissible,

are exempt from the quota system and may remain indefinitely in the country so long as they maintain their good standing and status. As regards persons desiring to enter the United States for other reasons, the wording of clause (c) reserves the applicable limitations and requirements of the laws and regulations (quota system for "immigrants" on national origin basis, length of permissible stay for non-immigrants, et cetera). Clauses (a), (b) and (c), being set off

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by semi-colons, are each self-contained. But paragraph 3 is designed, inter alia, to make clear that individuals desiring to enter under clauses (a) and (b) are subject to exclusion or expulsion as personally undesirable on the various grounds set for in the law.

The Department of State has indicated that it will expect to make additional comment on other points raised during the October 5, 1953 meeting of the German and American negotiators.

Copy to:
EU:GER:GEA
E:OD
PA:Od
OGC—Mr. H. S. Lay
E:FNP

U.S. High Commissioner for Germany
Bonn, November 12, 1953

CHBoehringer/gl
Nov. 12, 1953

(Original initialed CHB)

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Note Dated November 23, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of November 12, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between the United States and Germany.

The Office is now in receipt of a communication from the Department of State which contains comment on Article V of the United States standard draft regarding judicial rights and commercial arbitration. A discussion on this Article took place in the Ministry of Foreign Affairs on October 22, 1953.

With respect to the first sentence of paragraph 1, it will be recalled that the German negotiators asked whether the two forms of jurisdiction in Germany, namely, non-contentious jurisdiction (freiwillige Gerichtsbarkeit) and contentious jurisdiction (streitige Gerichtsbarkeit), were understood to be included thereunder. The answer to this question is in the affirmative, it being contained in the phrase "in all degrees of jurisdiction".

Again referring to the first sentence of paragraph 1, the German negotiators suggested that the words "in pursuit and in defense" be amended to read "in pursuit, in defense and in protection". Although the German negotiators subsequently agreed to withdraw their suggestion, following comment by the American negotiators, it is believed the former will be interested in the Department of State's views on this point.

The Department of State notes that if the precise words "in pursuit and in defense" used in the English-language version of the draft do not in German convey the notion that

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American

American citizens should be entitled to national treatment in all material aspects before the German courts, there may exist a small problem of effective translation. Accordingly, this Office has been requested to inquire whether it might not be appropriate to translate the words "in pursuit, in defense and in protection" in the German language version of the treaty, leaving the words stand as at present in the English version inasmuch as they are suitably adjusted to American usage and the business of American courts. This would be preferable, in the opinion of the Department of State, in correct treaty usage, to the informal understanding technique, if it is really the case that the phrase "in pursuit and in defense" does not come out with the full meaning in German. That is, the treaty's wording should on its face indicate the fullness of its meaning in an equivalent way in both languages, to the extent feasible.

With regard to the clarification of the point that Article V is not calculated to give a right to German nationals to contest or reopen vesting orders, as noted by the American negotiators, the Department of State recalls that the same question arose in connection with the agreement signed at Bonn on June 3, 1953, providing for reactivation of the 1923 Treaty of Friendship, Commerce and Consular Rights between Germany and the United States, and it was finally concluded that no special provision was necessary. If it transpires that a different conclusion is in order for the present treaty, for some reason not now readily apparent, the Department of State would of course want to see an appropriate proviso drafted and agreed to. As a general proposition, the Department of State is prepared to consider whatever special adjustments may be necessary to fit the treaty to special problems growing out of the War, the occupation and Germany's present status. However, the supposition of the Department of State is that the formulation of appropriate adjusting language should be deferred until all the problems are identified and delineated, in the hope that no more than a single well-turned provision, placed perhaps in the

protocol, will prove necessary (aside, perhaps, from some such questions as territorial applicability which if necessary may more expediently be handled separately). In the case of the FCN treaty between the United States and Japan, it transpired that no special provision was necessary; and in the case of the June 3, 1953 agreement referred to above a single paragraph (Article III) accomplished what was pertinent and proper for Germany in the circumstances.

With regard

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With regard to the German proposal to eliminate the provision for most-favored-nation treatment contained in the first sentence of paragraph 1, the Department of State indicates that it would not attach major importance to retaining the most-favored-nation clause in this paragraph, as the national treatment clause appears to afford an adequate measure of protection in the context. This Office has therefore been authorized to agree to the German suggestion to delete the most-favored-nation reference, provided the German negotiators continue to feel rather positively that it serves no useful purpose and would be better satisfied with it out.

It may be worth observing at this juncture, however, that the Department of State is decidedly interested in the precedent value of a United States-German treaty. Countries in other parts of the world often look to the United States and Western Europe to set the pattern and the norm in treaty relations. A particular wording or provision may have its chief immediate value, therefore, not so much because it plays at the moment an essential role in the bilateral relations of countries in the North Atlantic community, but because unless the latter are prepared to subscribe to it in treaties among themselves other countries where it is needed for demonstrably practical reasons may be disposed to resist it on the ground that it implies singling them out for unusual and suspicious demands. In the

opinion of the Department of State, Germany has an interest, as well as the United States, in establishing the rule of law and of decent treatment for the alien and his property throughout the world; and thus she presumably shares the United States interest in achieving a bilateral treaty which can be held up as a model of enlightenment for others to follow.

The Department of State adds that it has sought to draft a treaty which incorporates sound principle and equity, good generally for countries great and small, weak or powerful, in all parts of the world—something which it can in good conscience propose equally and indiscriminately to most countries everywhere. It is believed that this is the most efficacious approach to realizing not only the immediate objective of protection for American interests on a bilateral basis but also the remoter objective of building toward an internationally accepted standard of treatment for the alien. These treaties are entirely mutual and the United States is asking no commitment that it is not willing itself to undertake.

Regarding

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Regarding the discussion on paragraph 1 of the protocol, the Department of State notes that in using the term "legal aid", it had in mind the full area of matter apparently covered by the three German concepts of Rechtsbeistand, Armenrecht and Pflichtverteidigung. The translation of Rechtsbeistand for "legal aid" appears, in the opinion of the Department of State, to be inadequate. In the opinion of this Office, the word Rechtshilfe would appear to be appropriate in this case.

In general, the approach of the Department of State on this point is that special residence qualifications should not be attached to the national treatment rule. The view is that residence qualifications should be allowable, provided always that any residence test that may be adopted is applied equally

to the citizen and the alien. If the state, for a reason of public policy, which it deems controlling, wishes to withhold some privilege from non-resident citizens, it would not seem inappropriate for non-resident aliens to be denied the like privilege, for the test would presumably be motivated by objective rather than subjective considerations. Such residence requirements as may be found in State laws, in connection with legal aid, should not be attributed an exaggerated significance; and the Department of State is inclined to question whether there is actually a persuasive reason for reserving the "pauper's right" from the coverage of the treaty.

With respect to the discussion of the term "security for costs and judgment" in numbered paragraph 1 of the protocol, the Department of State indicates that, although it is not altogether certain that it fully comprehends the precise issue raised in this regard, its analysis tends to the conclusion that such issue as may exist is probably narrower than would at first glance appear. Under the treaty rule, there could be no alienage test in the security requirements imposed by the courts of either country. But courts in the United States and in Germany would remain free to impose objective requirements such as residence or presence of property within the jurisdiction, so long as imposed equally upon the citizen and the treaty alien. In the United States, it is understood that there tend to be less posting-of-security requirements than is common in Europe; and the requirements that are imposed are not in alienage terms, but in terms of non-residence or lack

of sufficient

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of sufficient assets within the jurisdiction. Without a complete State-by-State tabulation, the Department of State cannot say that a resident German national without property in the jurisdiction would necessarily be exempt from such requirements;

but it can assert that, with the treaty in force, no resident German would be subject to treatment less favorable than that granted a similarly resident citizen in a like property status. The Department of State concludes that perhaps this will be considered to satisfy the reciprocity feature of the German system.

As to the question of a guarantee by the United States for the collection of the costs of a German judgment given execution in the United States, the Department of State offers the following comment. Foreign judgments are not given automatic execution in the United States. This is so whether the judgment is foreign in the sense of being that of another State of the Union or in the sense of being that of a foreign country. Because the enforcement of foreign judgments thus touches upon delicate questions of inter-State relations within the Federal system, as well as upon the powers of a constitutionally independent judiciary, the policy of the Department of State has been to refrain from attempting treaty commitments in the matter.

A party-in-interest wishing to secure execution must file suit in an appropriate court for a judgment to enforce the foreign judgment. If the court deems that the foreign judgment should not for good and sufficient reason be disapproved, the petitioning party gets a domestic judgment which has all the usual rights of compulsory process for execution of the judgment and collecting the costs taxed. The purpose of the suit is to give the court opportunity to ascertain the validity of the foreign judgment and to satisfy itself that its enforcement would be consistent with the public policy of the jurisdiction where enforcement is sought; and if so satisfied the court will hand down the appropriate decision to bring about the enforcement. The situation is summarized in 50 C.J.S. (Corpus Juris Secundum) 540 as follows: "Except where they are contrary to public policy, valid judgments of the courts of foreign countries generally are recognized and given effect in state and federal courts". The basis is comity, which may or may not be deemed to require reciprocity in the case of judgments inpersonam, depending on the jurisdiction. (For example, in New York "a

foreign judgment may be recognized and enforced without regard to reciprocity", 50. C.J.S. 543).

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One of the items a court may wish to review is whether the costs allowed by the foreign court are excessive; and it may wish to scale down or disallow costs which it deems unreasonable. The situation with respect to recovery of costs is summarized in 50 C.J.S. 467-8 as follows: "In an action on a foreign judgment, plaintiff, if successful, is entitled to recover the amount which is presently due on such judgment . . . The recovery may include the costs of the foreign action if they constitute a part of the foreign judgment; but where the record or the transcript of the judgment contains no statement as to costs, or as to the amount thereof, costs cannot be recovered, in absence of proof thereof, and it has been held that an allowance in the new judgment for costs in the original action has been held error. Costs may be allowed in the action on the foreign judgment. The allowance of counsel fees has been held improper." (The citations given are often cases involving the enforcement in one State of judgments given in other States). While, therefore, the United States is not believed to be in the category of a country which refuses to assume an obligation regarding collection of costs, on the other hand the United States Government is not in position to undertake a definite commitment either that all foreign judgments will be enforced or that all costs will be accorded compulsory execution. With respect to affording compulsory process to secure collection of allowable costs, in connection with an enforceable foreign judgment, the Department of State presumes that reciprocity could be considered to exist between the United States and Germany; but if "reciprocity" were defined to imply that United States courts were compelled, without discretion, to

allow all costs assessed by a German court in all circumstances, the reciprocity suggested by the German negotiators could not be said to exist. If the latter is the case, the particular solution proposed by the German negotiators would not prove feasible.

With regard to the discussion on paragraph 2 of Article V, which deals with arbitration of controversies, the Department of State indicates that it would be prepared to agree to substitute the formula, in toto, adopted in the FCN treaties which the United States recently concluded with Japan and with Greece. That formula has perhaps the advantage of setting forth the objective in more affirmative and quickly comprehensible language, though in legal substance it is considered to be the same as the version contained in the United States standard draft. Both versions, however, represent the maximum commitment that the Department of State feels the United States is now in position to undertake. A considerably more ambitious undertaking is conceivable, but the present state of evolution of arbitration

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law in the United States is such that undertakings greater than those proposed are not practicable (even assuming that their desirability is agreed). Some of the States of the United States have adopted much more "advanced" concepts of the value and propriety of the arbitration process for settling disputes, otherwise referrable to litigation, than have others; the pattern of the relevant statutes and judicial decisions is quite uneven over the country as a whole. The proposal made by the Department of State, drafted in light of that circumstance, is confined to simply adapting to the commercial arbitration field, insofar as practicable, the national treatment and most-favored-nation standards which figure so largely in the scheme of the treaty as a whole.

With respect to specific questions raised by the German negotiators, the Department of State observes that the proposed draft does not say either that the decision of an arbitration body is final and unchallengeable, or that it is not. It says that when an award has reached the stage of finality and enforceability under the laws of the country where the arbitration body sits and renders its decision, it shall be entitled to the applicable measures of enforcement available in the treaty country where enforcement is sought; and that the courts of the latter shall not deny enforcement on the grounds that the award is tainted with alienage, but may deny enforcement only on such objective grounds as would likewise render a domestic award fatally defective. The treaty thus respects the right of each country to decide what role its courts ought to play in the commercial arbitration process; and the Department of State is convinced that a treaty of the type under negotiation cannot hazard to undertake to write new commercial arbitration law, which would place a limited group of international commercial arbitration in a special class apart from, and in a status more privileged than, the generality of commercial arbitrations.

The Department of State also observes that it does not understand precisely what is meant by "guarantees concerning security for execution of awards", insofar as this relates to matter not already covered in the preceding paragraph.

As to extension of the provision to cover recognition of clauses providing for submission of future controversies, the position of the Department of State is that the treaty should be neutral in this connection, avoiding a stipulation either that such future-submission clauses must, or that they may not, be recognized by the courts of the jurisdiction where enforcement is sought. That is, each jurisdiction should be left free to determine

determine as a matter of its general public policy whether such clauses shall be enforceable, so long as discriminatory disabilities are not placed upon alien arbitrations, as compared with domestic, in the matter. Most of the heavily commercial States (e.g., New York) have adopted modern arbitration laws under which clauses providing for future submissions are enforceable; but there are yet some States where there persists the common-law view that parties to a contract cannot be forced to submit to an arbitration except with reference to a controversy already in existence at the time the contract was entered into and therein provided for. Until the States share a more universal view, it is not considered wise or expedient to attempt a more far-reaching treaty engagement than that proposed, even though as a practical matter there may appear to be slight likelihood that the courts of the States maintaining the common-law attitude will become involved in arbitrations of the international character arising under the treaty.

With final reference to paragraph 2 of Article V, it will be recalled that the German negotiators expressed preference for limiting arbitration proceedings solely to commercial transactions. The Department of State observes that, if the German view continues to be that the scope of the provision should be expressly confined to controversies arising out of commercial transactions, the Department would not object to placing appropriate qualifying language in the treaty to that effect.

cc: EU:GER:GEA
E:OD
PA:OD
OGC—Mr. H.S. Lay
E:FNP

U.S. High Commissioner for Germany
Bonn, November 23, 1953

CHBoehringer/mm November 23, 1953 (Original initialled CHB)

Noted Dated December 9, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of November 23, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between the United States and Germany.

This Office is now in receipt of communications from the Department of State which contain comment on Article VII of the United States standard draft regarding business activities of persons and companies. Discussion on this Article took place in the Ministry of Foreign Affairs on October 15 and 19, 1953.

According to the Department of State, this Article may be considered the heart of the treaty presently under negotiation; especial care has gone into its drafting, and the Department of State has special regard for it. The Department's views on the principles it reflects, while not final or definitive in the sense of being arbitrary or inflexible, are earnest and long-considered. Differences between the present standard version as proposed to the German negotiators and the treaties concluded with other countries at various times in the past are attributable to the continuous effort made to improve the adequacy of the standard wording, and to the adjustments that have sometimes had to be made during the give and take of negotiation in deference to views strongly urged by other countries in light of special problems they faced. Such differences, therefore, reflect the importance rather than the unimportance attached to the Article.

It will be recalled that, during theinitial [sic] discussion of Article VII, the German negotiators expressed the viewpoint that, in

their opinion, they considered the Article as presently drafted as somewhat over-cautious and overlapping. The Department does not consider Article VII to be over-cautious, and further notes that during the third and fourth business meetings, which were devoted to discussions on Articles VII and VIII, the German negotiators brought up several points which suggest that they hesitate to undertake commitments as extensive as those proposed by the Department.

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The Department of State does not find "overlapping" features in its draft of Article VII. Its desire is and has been that the draft be as concise as feasible and as free as possible of duplicating wordage; and any suggestion the German negotiators may wish to make with a view to more fully realizing this objective, without sacrifice of clarity and legal sufficiency, would be welcomed. However, the German suggestion to deal with the treatment of individuals and corporations, respectively, in separate provisions seems calculated to produce the contrary result of introducing needlessly repetitious wordage into the treaty.

During the preliminary discussion of Article VII, the German negotiators stated they had gained the impression that the language of that Article, and also Article VIII, had been drawn up to include safeguards against possible recurrence of unfortunate experiences with certain countries. The Department of State notes that, in drafting Article VII, it had no particular country or category of countries in mind, but aimed merely at establishing a body of rules deemed to be sound and equitable for generally all countries with enlightened concepts of law and a belief in private enterprise.

The Department of State notes with satisfaction that the German negotiators appear to feel that their concept of the principle which ought to be embodied in paragraph 1 is in accord with the

Department's. A meeting of minds on this acore [sic], in the opinion of the Department, forwards the negotiations a major step, in view of the very important role this paragraph plays in the scheme of the treaty.

It will be recalled, however, that the German negotiators made a reservation to paragraph 1 by noting that the provisions applicable for aliens contained in paragragh 12 of the Gewerbeordnung (Law on Trades) and paragraph 292 of the Aktiengesetz (Corporation Law) would have to be maintained.

The Department of State indicates that, if it correctly reads the quoted sections of these two laws, they are readily reconcilable with the treaty, along the lines of the proposal made by the German negotiators for resolving the apparent difficulty. That is to say, these laws both expressly recognize the authority of the Government to make paramount treaty commitments with regard to the establishment of alien-controlled businesses. Paragraph 3 of Article VII, on the other hand, would allow the German Government to maintain "special formalities" in connection with the establishment of American enterprises. The licensing system contemplated by the German legislation could therefore be maintained, so long as the

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necessary licenses were in the case of Americans "granted automatically and as a matter of course", as stated by the German negotiators, thus making of the requirement a mere formality.

So far as the treaty is concerned, it would be irrelevant whether the licensing authority resides in the Federal Government or in the Laender. As a matter of fact, control over the formation of corporations and the establishment of business in the United States is likewise under State, rather than federal, jurisdiction.

The Department of State does not wish to hazard a formal general interpretation of the phrase "special formalities" as

used in paragraph 3 of this Article. It is believed preferable to state the idea envisaged in comprehensible general terms and to let interpretation evolve on a case-by-case basis. It might be said, however, that paragraph 3 was included on the theory that while the treaty should be firm as to the core principle of non-discrimination set forth in paragraph 1, it ought for very practical reasons to allow a degree of tolerance at the periphery with respect to matters of detail that in relation to themain [sic] objectives are of only trivial consequence. The aim is to afford a viable solution, in just the terms suggested, to just such a problem as that posed by the Gewerbeordnung and the Aktiengesetz. In the United States, the formula covers, for example, the requirement found in the domestic corporation laws of certain States to the effect that the signers of articles of incorporation must be American citizens. But, as is well known, this requirement is in effect a mere technicality which in no way actually hampers aliens from freely taking out corporation charters in that country, for citizens willing to act as signers are readily procurable.

The Department of State is of the opinion, as tentatively advanced by the American negotiators at the October 15 meeting, that the insurance business ought to be left fully covered by the rule of paragraph 1. American insurance interests, moreover, have taken particular pains to make known to the Department and to the Senate their desire and expectation that their foreign and international business be adequately dealt with in treaties of friendship, commerce and navigation; and failure to do so in the case of the treaty under negotiation would undoubtedly provoke vigorous protest.

It will be recalled that on October 19, the Economics Ministry technical expert on insurance matters stated that his Ministry would be willing to drop a proposal to add insurance to the list of reserved enterprises given in paragraph 2, if it were clearly understood that the licensing requirement were covered by the term "special formalities" mentioned in paragraph 3 of this Article.

Without

Without a more detailed knowledge of the German insurance law and regulations, and the way the Federal Government might propose to apply the same in light of the treaty when it comes into force, the Department of State indicates that it is unable to venture a categorical opinion, but for the moment must confine itself to an "in principle" agreement with the position taken by the insurance expert of the Ministry of Economics. Just what does and what does not fall properly within the purview of "special formalities" would need to be measured against the special nature of the insurance business, and the practical dimensions of the task faced by the insurance regulatory bodies of assuring that the alien company is reasonably well equilibrated to the domestic economy, for the purpose of protecting the policy-holding public. In the field of insurance, it is considered legitimate to require reasonable bond of alien companies, so as to assure that there will be within the jurisdiction realizable assets to back their obligations to policy holders; domestic companies are not required to post the same bond because they already have reachable assets within the jurisdiction. The Department adds that the Economics Ministry insurance expert correctly stated that bonding requirements, similar to those enforced in Germany, exist in the United States. If the deposit required in Germany is considered reasonable according to accepted insurance standards, conflict with the treaty commitment would not appear to arise.

It has been suggested by the Department of State that this Office might appropriately invite attention to a Minute of Interpretation worked out to clarify the meaning of "national treatment" for insurance in the case of the Treaty of Friendship, Commerce and Navigation between Denmark and the United States. That Treaty was negotiated on the basis of an earlier standard draft that lacked the "special formalities" provision. This interpretative understanding reads as follows:

> "It is understood that either Party may, consistently with the terms and intent of the Treaty, apply specialrequire-

ments [sic] to alien insurance companies with a view to assuring that such companies maintain standards of accountability and solvency comparable to those required of like domestic companies, so long as such requirements do not have the effect of discrimination in substance against such alien companies."

Regarding paragraph 2 of Article VII, it will be recalled that the German negotiators inquired whether the word "communications" included broadcasting and television. The Department of State has informed this Office that the response is in the affirmative.

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RESTRICTED -5-

With respect to "air and water transport", also in the first sentence of paragraph 2, the German negotiators questioned the necessity of including the words "air or" on the ground that a separate German-American air transport agreement was intended to cover in detail all questions relating to air transport. The German negotiators suggested that a clause be incorporated in the final protocol noting that both sides were desirous of negotiating a special bilateral air transport agreement as soon as possible.

In commenting upon the German suggestion, the Department of State notes that there would probably be no objection, in principle, to placing in the protocol a suitable clause to the effect that both countries are desirous of concluding a special bilateral transport agreement as soon as possible. It may transpire, however, that an air transport agreement will have been concluded before the treaty presently under negotiation, or else may be so far advanced in the negotiation by the time the treaty is ready for signature that there will be no point to such a clause.

Reference is now made to the discussion which took place on October 15 regarding the words "banking involving depository

and fiduciary functions", which appears in the first sentence of paragraph 2. It will be recalled that the German negotiators expressed preference for the following change in language: "banking, insurance and fiduciary functions", on the ground that all banking, insurance and fiduciary transactions require special licenses under German legislation.

In its comments on the words "banking involving depository or fiduciary functions", the Department notes that the object of this wording is to circumscribe the reservation as much as feasible, and thus to maximize the extent to which the banking business is covered by the rule of the first paragraph. "Fiduciary" and "depository" designate the aspects of the business which involve the custody and handling of "other people's money" and which, for that reason, lay banks open to the strictest measure of public regulation and control. The standards applied in this connection are, indeed so severe in the United States that "branch banking" across State lines is generally prohibited; that is, a State will permit only banks chartered under its own laws to do a general deposit-receiving business within its boundaries, and will not extend the privilege to branches of banks chartered in other States. Insofar as other aspects of the banking business are concerned, strong reason for a treaty reservation tends to disappear; and it is believed that there is a real interest in and need for banking activities on an international plane that do not entail the maintenance of a deposit-receiving business in the foreign country (except an accommodation and forwarding-agent function on behalf of home-office clients, which

would

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would be permitted by the third sentence of paragraph 2). For example, a bank may wish to maintain a foreign branch to handle letters of credit and travelers' checks, finance international trade transactions, service loans it has made to borrowers in the foreign country, et cetera.

During the course of the discussions on October 19, a representative from the Transportation Ministry inquired whether the right which either party could reserve with respect to limiting the extent to which aliens might establish, acquire interests in, or carry on enterprises, as provided for in sentence 1, paragraph 2, was limited by existing or future legislation or to be determined in each case, regardless of applicable legislation. According to the Department, it is correct that the limitations referred to may be in either existing or future legislation. The reservation is open-end as to the time the legislation may be adopted; but the legislation is subject, of course, to the qualifications stated in the second and third sentences.

A question also arose on October 19 regarding the coverage of the word "transportation", contained in the third sentence of paragraph 2. According to the Department, the reference to transportation has significance only insofar as transportation is referred to in the first sentence of paragraph 2. Except as transportation is reserved in the first sentence, the subject remains under the full rule of paragraph 1; and the purpose of the third sentence is to restore to the coverage of paragraph 1 a portion of what was abstracted from it by the first sentence reservation. The word "transportation" in the third sentence could therefore, if fully spelled out, read "air or water transport" as in the first sentence.

As previously indicated, the word "communications", also given in the third sentence of paragraph 2, does include radiobroadcasting. The Germannegotiators [sic] stated that if this were the case difficulties would result from existing German legislation in this field. It will be recalled that the German negotiators promised to supply the American negotiators information on all German legislation which might conceivably be in conflict with sentence 3, paragraph 2, Article VII. To date this material has not been received.

It will also be recalled that on October 19, the German negotiators asked for comment on the words "in which they are permitted to engage", also contained in the third sentence of paragraph

2, with special reference as to by whom, that is, the home country or the host country, would the permit be granted.

According

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According to the Department of State, the passive-voice form ("are permitted to engage") here, as elsewhere in treaty drafting, has reference to the permission vouchsafed by the host country. The wording here is not intended to imply, however, that the host country retains discretion arbitrarily to withhold permission. The intendment is that the relevant enterprises of each party shall be permitted to establish and maintain agencies and branch offices necessary to the effective conduct of their legitimate international business.

Comment from the Department of State on other subjects discussed during the October 15 and 19 meetings will be given in a subsequent note.

U.S. High Commissioner for Germany
Bonn, December 9, 1953

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Note Dated December 10, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of December 9, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussion with respect to a new treaty of friendship, commerce and navigation between the United States and Germany.

This Office has now received comment from the Department of State regarding paragraph 2 of Article V which, in its entirety, deals with judicial rights and commercial arbitration. It will be recalled that discussions on paragraph 2, which relates solely to commercial arbitration, were held in the Ministry of Foreign Affairs on October 22 and 26, 1953.

On October 26, the German negotiators referred to the American negotiators an article entitled "Handelsschiedswesen in den USA" (Arbitration System in the USA) from the September 3, 1953 issue of the Mitteilungen der Bundesstelle fuer Aussenhandelsinformation (Communications of the Federal Office for Information on Foreign Trade). On that occasion, the German negotiators stated that if official confirmation could be obtained from the Department of State regarding the accuracy of the statements contained in that article, with special reference to finality of arbitration verdicts and enforcement of awards rendered by arbitration commissions, the difficulties discussed during the course of the October 22 meeting would be largely overcome.

The Department of State has informed this Office that it does not feel that it can properly undertake to make official

pronouncements as to what the details of law of the several States may be in a matter of this sort, as such an undertaking would be outside its functions; nor is it equipped to undertake a thoroughgoing commentary even of an informal sort on the article in question cited above. The complexity of such a task is illustrated by the fact that the Corpus Juris Secundum (CJS) of the United States devotes 155 pages to a general summary of the law on Arbitration and Award. Allowing, however, for oversimplifications, differences in legal terminology, translation difficulties, et cetera, the article would appear in the main to give a not misleading general picture. The list of

jurisdictions

[End of page]

jurisdictions having modern statutes providing for future-dispute arbitrations, for example, coincides with the published list (dated 1952) prepared by a leading American authority on the subject; and the article's underlying premise that the courts of the United States generally tend to favor and support lawful and proper arbitrations is consistent with the opinion of competent students of the subject, as the two following quotations will illustrate:

> "Although as already noted arbitration was early recognized at the common law as a mode of adjusting matters in dispute, yet, from efforts perceptible in the early cases to construe arbitration proceedings and awards so as to defeat them, it would seem that they were not originally favored by the courts. This hostility, however, has long since disappeared, and, by reason of the fact that the proceeding represents a method of the parties' own choice and furnishes a more expeditious and less expensive means of settling controversies than the ordinary course of regular judicial proceedings, it is the policy of the law to favor and encourage arbitration. In proper cases the

courts are reluctant to limit the scope of the remedy; and every reasonable intendment will be indulged to give effect to such proceedings, and in favor of the regularity and integrity of the arbitrator's acts." (6 C.J.S. 152-3).

"The finality of decisions, without appeal therefrom, is now legally established. Although few principles of arbitration have been more subject to attack from the legal viewpoint, courts have quite universally respected the right of parties so to bind themselves. Many have been the methods used to defeat this principle. One has been a provision in arbitration law permitting either party to refer to a court a question of law that he thinks has arisen during the arbitration. In two states, namely Connecticut and Massachusetts, a question of law must be presented to a court for determination during the arbitration, if both parties so request. In Illinois and the four states which have enacted the Uniform Arbitration Act (Nevada, North Carolina, Wyoming and Utah) either party or the arbitrator on his own motion may request a legal ruling from a court. In states where this type of law prevails, arbitration is infrequent.

"While it is true, under statutory arbitration laws that provide for review on the grounds of misconduct on the part of the arbitrator, that courts have been tempted

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to examine awards as to errors of judgment with a view to the annulment of the award, on the whole there exists today under arbitration law a security as to finality of decisions by the arbitrator which greatly attracts parties to arbitration.

"Thus, it was held in Fudickar v. Guardian Mutual Life Ins. Co., 62 N.Y. 392 (1875), p.400: 'The courts in this

State have adhered with great steadiness to the general rule that awards will not be open for errors of law or fact on the part of the arbitrator,' and it was said in Wenger & Co. v. Propper Silk Hosiery Mills, 239 N.Y. (1924), at p. 202: 'It is the duty of the court to enforce their agreement rather than to undertake itself to settle the dispute or to narrow the field of arbitral disputes.' More recently it was stated in Spring Cotton Mills v. Buster Boy Suit Corp., Inc., 275 App. Div. 196 (1949): 'Every award rendered in compliance with all legal requirements is a complete, final and binding determination of a controversy which may not be disturbed, unless the statutory grounds for doing so exist.'

"In conclusion, it may be affirmed that notwithstanding an occasional adverse decision, the attitude of courts toward the legal enforcement of agreements and awards is a favorable one, as the following indicate:

"It has been declared to be the obligation of the courts 'to shake off the old judicial hostility to arbitration,' or 'here again we should not choke the arbitration process which has been given congressional approval by the fetters of earlier judicial conceptions,' or 'there is a studied effort in the (U.S.) Arbitration Act to provide for the enforceability in designated tribunals of the decisions reached by arbitration boards.' [Federal citations].

"In the interpretation of submission agreements and awards alike there is noticeable a more liberal attitude to uphold awards wherever possible and to give a liberal interpretation to arbitration agreements. This was recently pointed out in several decisions of Supreme Courts, as for instance in Iowa, where the court said: 'the settlement of civil disputes by arbitration is a legally favored contractual proceeding whose object is to speedily determine the matter by a tribunal chosen by themselves, and thereby avoid the formalities, delay and expense of litiga-

tion in court'; and in Kentucky: 'this court, has, as have a majority

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majority of courts in other jurisdictions, by their endorsement thereof, encouraged settlements by compromise or arbitration, and construed applicable law liberally to uphold awards thus made, where there is no showing of fraud or mistake'; and again in Louisiana: 'the primary purpose of the Louisiana arbitration statute is to enforce agreements to arbitrate and the awards of the arbitrators'; in New York: 'arbitration is to be encouraged.'

"Other states have announced similar support in their court decisions. For example: in North Carolina, (it is) 'the policy of the law and the care of the courts to liberally sustain this very effectual and valuable method of bringing controversies to an end, considering that in many instances the controversy may have a more friendly ending and a speedier determination, and even a greater probability of justice between the litigants than may be afforded by the more belligerent methods of trial in the courts of law'; in Texas 'arbitration is a proceeding favored in Texas law . . . . We know of no instance under the laws of Texas where a party has a capacity to conduct litigation, that he has not also power to refer this litigation to fair and impartial arbitrators for arbitration.' " (Kellor, Arbitration and the legal Profession, pp. 27-8, 29-31).

It may be noted, however, in reference to the concluding section entitled "Legal Recourses", that in addition to the grounds listed an award may be upset on the ground that it was based on an illegal contract or related to an illegal transaction (e.g., a gambling debt); that the procedures prescribed by statute or in the arbitration agreement were not observed; or

that the losing party was not given due opportunity to appear and be heard. The variance of conceptions among the States as to the enforceability of an agreement to arbitrate future disputes, moreover, leads to differences in the view that might be taken toward an award concerning a "future dispute" rendered pursuant to a proceeding deliberately boycotted by one of the parties. In connection with this, and also as of pertinence to the general status of arbitration law in the United States, the following further quotation from a well-known authority is offered:

> "In the United States, Gilbert v. Burnstine, decided by the highest New York court in 1931, is the foremost authority for the enforcement in this country of arbitration awards made in foreign countries. (255 N.Y. 348, 174 N.E. 706). In the Gilbert case, the award was rendered by a London tribunal after notice of the arbitration had been served on the defendant in New York. The defendant refused to appear before the tribunal in London and did not participate in the arbitration. Nonetheless, the New York court
>
> held

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> held that the award would be enforceable in New York if the arbitration had been held in conformance with the arbitration law of England.
>
> "It is important to note that the Gilbert case conditioned the enforcement here of foreign arbitration awards on the proper acquisition by the foreign arbitration tribunal of jurisdiction over the non-English defendant. If the foreign arbitration tribunal does not acquire proper jurisdiction over the American national defendant, then it is entirely possible that the American defendant could successfully defend an action in the courts in this country

on the award granted by the foreign tribunal. But it is simple for the foreign tribunal to acquire jurisdiction over the American national as a properly drawn arbitration clause will provide for the arbitration tribunal, the place in which the arbitration is to be held and that the American resident submits, by signing the contract containing the arbitration clause, to the jurisdiction of the foreign arbitration tribunal. Under these circumstances the award will probably be enforced in almost all important international trading states in the United States. The Gilbert case and subsequent cases which have followed it have probably done more in the United States for the enforcement of arbitration awards rendered by foreign arbitration tribunals than the Geneva Convention of 1927 did for the states which ratified it." (Rosenthal, "Arbitration in the Settlement of International Trade Disputes", KI Law and Contemporary Problems (1946), 808, 823).

In conclusion, the Department of State has informed this Office that, should there be some precisely defined questions in the field of commercial arbitration which the German negotiators wish to have clarified in connection with their consideration of paragraph 2, Article V, the Department will endeavor to ascertain the answers.

U.S. High Commissioner for Germany,
Bonn, December 10, 1953.

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Note Dated December 12, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of December 10, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

This office is now in receipt of a communication from the Department of State containing comment on the exchange of views held on October 8 and 26, 1953, between the German and American negotiators with respect to Article VI regarding protection of property. Preliminary comments on certain aspects of those discussions were transmitted to the Ministry of Foreign Affairs by means of this Office's note of November 5, 1953.

As indicated in the last cited note, the German suggestion that the words "and in accordance with due process of law" be inserted in the first sentence of paragraph 4 is acceptable to the Department. However, the two further changes suggested by the German negotiators during the course of the October 26 meeting appear, in the Department's viewpoint, to be questionable. It will be recalled that the German negotiators suggested that the first sentence of paragraph 4 be altered to read:

> "Property of nationals and companies of either Party must not be taken or otherwise restricted within the territories of the other Party except for overriding reasons of public welfare and in accordance with due process of law, nor shall it be taken without prompt payment of just compensation."

The first suggested change, namely, the insertion of the words "or otherwise restricted" after "taken" appears to imply a greater commitment than the United States is prepared to undertake. Discriminatory restrictions on property being already precluded elsewhere in the draft treaty, the apparent effect of this insertion

would

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would be to prohibit all types of non-discriminatory restrictions on property except on payment of compensation to the alien property owner even in cases where payment is not normally made, or expected to be made, to anyone. A municipal zoning ordinance prohibiting the erection of a factory in a residential zone, or an apartment house in a zone reserved to single-family houses, is a restriction on property and a restriction, moreover, which can greatly affect the market value and income-producing potentialities of a tract of land. But compensation is not paid to the owners affected by a valid zoning ordinance; and the Department observes that it does not readily perceive why a treaty exception should be made in favor of German property owners in United States municipalities (or mutatis mutandis, American owners in Germany). Many other types of legitimate restrictions that do not give rise to compensation can be cited: for example, a restriction on the use of certain properties, or properties in certain areas, for the sale of alcoholic beverages; restrictions on the rates a utility company may charge, or on the areas in which it must or may not furnish services; regulations relating to the conservation of soil and water, and afforestation, in rural districts; et cetera.

It is true that on a strict and literal reading of the German-proposed language, compensation for "restrictions", as distinguished from "takings", is not technically required; and a mere assertion that property shall not be restricted except for good reasons of public policy and in accordance with law would

hardly seem objectionable. However, placing this idea in the context of paragraph 4, the primary concern and orientation of which is a rule on compensation, leaves the impression that its purpose is somehow to suggest that compensation must be paid for "restrictions" falling short of "takings", especially when paragraph 3 already prohibits arbitrary restrictions on property and it is not to be supposed that merely repetitious material would be included in paragraph 4.

Having stated the foregoing objection to the insertion regarding "restrictions", the Department may well add that the word "taken" has been chosen to convey the idea that the standard rule on compensation is aimed to cover more than outright physical seizures. The word is borrowed from United States constitutional jurisprudence, where it covers indirect deprivations of property of the so-called "Tucker Act" type as well as direct expropriation proper.

The second additional change, namely, substituting "overriding reasons of public welfare" for the phrase "a public purpose" appears to the Department of State to be an unnecessary refinement. If "overriding reasons of public welfare" means more than "public purpose", it would appear to constitute a latent source of fruitless friction over particular judgments as to whether this or that

taking

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taking is or is not dictated by "overriding" reasons. If a Government determines to take a given property for plausible reasons which it considers to be in the public interest, and not for the mere benefit of private interests, it is very doubtful whether anything useful is to be gained by subjecting that decision to treaty challenge on the ground that it was not really dictated by unavoidable force of circumstance. The important objective on which the treaty might most usefully concentrate is assurance of proper compensation if there is a taking.

Should additional comments on Article VI be received from the Department of State, such comment will be transmitted to the Ministry of Foreign Affairs.

U.S. High Commissioner for Germany,
Bonn, December 12, 1953.

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Note Dated December 14, 1953
(Ex. 12)

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THE FOREIGN SERVICE
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The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of December 12, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

This Office is now in receipt of communications from the Department of State containing comment on the exchange of views which took place on October 26 and 29, 1953, with respect to Article IX regarding property rights.

In connection with the October 26 general discussion on Article IX, the Department observes that the formulation of the rule on real property follows in essence the standard version in the treaties with Italy and several other countries (e.g., Israel, Uruguay and Colombia). The different versions appearing in the United States FCN treaties with Ireland and Denmark are the consequences of changes made during the process of negotiation. Ireland and Denmark both had actual or prospective features in their land legislation, for reasons peculiar to those countries, that made it impossible for them to accept the standard version without qualification. The reservations that they would have required were such that the most satisfactory approach proved to be a restatement embodying a more limited and less positive reciprocal rule. The standard version asserts a stronger body of rights, from the viewpoint of both parties, and the Department of State is pleased that the German Government concurs in it.

It will be recalled that on October 26 the American negotators [sic] presented to the German negotiators copies of a memorandum dated December 8, 1947, prepared in the Department of State and entitled "Rights of Aliens to Acquire Interests in Real Estate in the Several States". There are now enclosed single copies of two informal studies received from the Department and entitled "Ownership of Real Property in the United States by Alien Corporations" and "Ownership

of

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of Real Property in the United States by Aliens", respectively. These represent a recent revision and refinement of the material contained in the above cited memorandum of December 8, 1947, and they reflect a considerable amount of research devoted to make as accurate and up-to-date summary of this complicated subject as the facilities of the Department permit. It will be noted that these do not purport to be official statements concerning State laws.

The Department has also given comment with respect to paragraph 3 of Article IX. In an earlier version of the standard draft this paragraph was no. 4. In order to avoid the possibility of misunderstanding, paragraph 3 is given below:

> "3. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment with respect to acquiring, by purchase, lease, or otherwise, and with respect to owning and possessing, personal property of all kinds, both tangible and intangible. However, either Party may impose restrictions on alien ownership of materials dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on particular types of activity, but only to the extent that this can be done without impairing the rights and privileges

secured by Article VII or by other provisions of the present Treaty."

The Department notes that the second sentence embodies an exception to the first, and is intended to permit either party to depart from the rule of national treatment to the extent specified. In this sense there is indeed a "conflict" between the language of the first and second sentences, as there must be if the scheme of stipulating broad national treatment subject to a defined exception is to be followed.

The Department further notes that it does not quite follow the German argument with reference to "secret patents". Paragraph 3 does not have to do with the establishing of a patent right, a matter which is dealt with in Article X on industrial property, though it would be applicable to the buying, owning, and possessing, et cetera, of a duly established patent. If the law of a party allowed its nationals to take out "secret" patents (a factor of Article X), and if the law further permitted such patents to be alientated by, and bought and sold among, nationals, Article IX (3) would in principle vouchsafe to the treaty alien the same right to buy or otherwise obtain title to such patents and to own and possess the same as though a national. (This, of course, assumes that some controlling factor

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factor governed by the security reservations in Article XXI, paragraph 1 (d) is not present). The Department did not have a "secret patent" situation in mind when the second sentence of paragraph 3, Article IX, was formulated, and has not seen any particular reason why such patents should be included in the reserved matter of that sentence. The broad rule of the first sentence is a fairly recent innovation in treaty-making; and the major purpose of the second sentence is to close a loophole through which the reservations in Article VII, paragraph 2,

might otherwise be frustrated. That is, if the first sentence were not suitably qualified, an alien would become entitled through a process of stock buying to acquire a controlling interest in a corporation with respect to which the law, pursuant to Article VII (2), did not allow aliens to have a controlling interest.

Enclosures:

"Ownership of Real Property in
the United States by Aliens";
"Ownership of Real Property in
the United States by Alien Corporations."

U.S. High Commissioner for Germany,
Bonn, December 14, 1953.

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Note Dated December 15, 1953
(Ex. 12)

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THE FOREIGN SERVICE
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UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of December 14, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

This Office is now in receipt of communications from the Department containing comment on the discussions held on October 19 and 29, 1953, regarding Article VIII concerning employment, professions and non-profit activities.

It will be recalled that the German negotiators suggested that Article VIII could be eliminated in its entirety for the following reasons:

1. Paragraph 1 was considered unnecessary and self-evident with regard to the relationship between Germany and the United States;

2. Paragraph 2 was considered inappropriate since it would apparently be subject to U.S. Senate reservation, and

3. Paragraph 3: The content of this paragraph was contained in the German proposed revision of Article III.

Discussion on October 29 was directed to the version of Article VIII dated January 19, 1953. However, as subsequently indicated in the current negotiations, that version has now been superceded by a version dated January 21, 1953, a copy of which is in the hands of the German negotiators. In the

revised version, the former paragraph 2 has been dropped from the draft, in consequence of the Senate reservation. In the former paragraph 3, now paragraph 2, the words "and professional" are omitted from the list of activities.

During

[End of page]

RESTRICTED -2-

During the October 19 discussions, the German negotiators asked, with respect to paragraph 1, whether the word "engage" in the first sentence, pertained to the internal operations of nationals and companies. The Department observes that the position taken by the American negotiators, namely, that the entire paragraph 1 was limited to such operations, is correct. The Department adds that the rule does not reach to the right to engage in the "practice" of a profession, as that concept is generally understood, but only to the right of an enterprise to have the services of professionally trained technicians in connection with its internal affairs.

With regard to the German suggestion that paragraph 1 might be deleted as being unnecessary and self-evident, the Department observes that it has some difficulty understanding that position. The mere fact that a provision may merely seem to confirm the continuance of a situation that actually exists without a treaty does not, in the Department's opinion, constitute a sufficient reason for deleting it. This kind of reasoning, indeed, could lead to excising the bulk of the present content of the draft.

The dropping of old paragraph 2 increases the desirability of maintaining paragraph 1, for without paragraph 2 American investors, and conversely professional groups such as accountants and engineers, must look to paragraph 1 for their treaty rights in connection with certain types of servicing that may be necessary to the efficient functioning of a business enterprise. (One example would be the preparation of the kind of account-

ing analysis that the Securities and Exchange Commission requires as a condition-precedent to the public offer of new securities). It may well be, of course, that American firms would require less American-trained specialist assistance in Germany than in many other countries where there exists a considerably smaller reservoir of qualified local professional personnel, and that the German Government in fact has no intention of hampering the very limited type of activity contemplated in paragraph 1. Nevertheless, the paragraph embodies a sound and desirable principle that ought to be asserted in the treaty. The provision is attributed some importance by American interests; and its omission from the treaty would be calculated to arouse apprehensions concerning Germany's intentions, as well as set a bad precedent for negotiations with countries where its presence would be most helpful in curbing extreme tendencies to discriminate against, for example, American accounting firms there established for the purpose of servicing American investments.

The German request for omission of the former paragraph 2 has already been met, as previously indicated. The difficulties involved in attempting to deal with the subject matter of old paragraph 3

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paragraph 3 (now paragraph 2) in the way the German negotiators have suggested are alluded to in this Office's second note of November 4, 1953, which contains comment on Articles II and III.

It will be recalled that during the course of the October 19 discussions, the German negotiators referred in general terms to Articles VII and VIII, it being noted that those Articles appeared to pertain to independent commercial, financial and other business activities without mention being made of non-independent activities such as those carried on by persons in an

employee status. In commenting on the points raised by the German negotiators on that occasion, the Department of State observes that it does not believe that the draft, though giving special emphasis to "independent" activities, fails to provide for those of a "non-independent" character. The right to "engage in" and "activity" is construed by the Department in principle to include the right to serve in an employee capacity in such activity. This result is clear in the wording of Article VIII, paragraph 2 (the former paragraph 3); and it appears also, though less conspicuously, in the wording of the first sentence of Article VII, paragraph 1, as follows: ". . . . . engaging in all types of . . . . . activity for gain . . . . . directly . . . . ."

U.S. High Commissioner for Germany
Bonn, December 15, 1953.

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First Note Dated December 16, 1953
(Ex. 12)

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The office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its note of December 15, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

This Office has now received comments from the Department with respect to the discussion which took place on October 29, 1953, regarding Article X which concerns industrial property.

Regarding paragraph 1 of Article X, the German negotiators stated that they considered it superfluous since both the United States and Germany adhered to the Paris Convention on protection of industrial property rights which covered in detail all points pertaining to this field. It was additionally noted that the provisions of this paragraph were not contained in the 1923 Treaty of Friendship, Commerce and Consular Rights between Germany and the United States. It will be recalled that the American negotiators agreed to refer the German proposal for elimination of paragraph 1 to the Department, with the recommendation that it be accepted.

The Department has now indicated to this Office that it does not wish to have paragraph 1 dropped, even though its presence is not indispensable. The reaffirmation of the basic principle contained in the well-established multilateral instrument referred to as the Paris Convention would not appear to be objectionable for any substantive reason. Since the para-

graph has become standard in post-World War II treaties concluded by the United States with other countries, its omission might merely give rise to conjecture which might as well be avoided.

With regard to paragraph 2, the Department notes that it is not correct that this provision is missing from the United States-Japan FCN treaty. That instrument, the first in which the provision appears, carried it as Article V, paragraph 2. The Department is not aware of any separate bilateral Japanese-American agreement

relating

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relating to the subject matter of this provision, and suggests that there must be some confusion over just what individual commitments the United States and Japan have undertaken toward each other. The Department notes that it might help to clarify matters if the German negotiators would more definitely identify what agreement they have in mind. As the German suggestion for transposing and elaborating upon this provision appears to be based, at least in part, on a misunderstanding of United States-Japanese contractual relations, and as this suggestion cannot be confidently assessed until its contemplated outlines are more precise, the Department does not believe it can at this time usefully add much to the comments made with respect to Article I. Those comments, it will be recalled, were transmitted by this Office to the Ministry by means of its first of two notes dated November 4, 1953.

The Department's present inclination, however, would be against transposing the provision to the head of the treaty, or expanding it to include a variety of other subject matter. The provision relates to a rather narrow technical subject matter most appropriately carried in juxtaposition with one of the relevant specific provisions of the main body of the text.

Article X, dealing with industrial property, appears to be a logical place, though the position favored by the Japanese is hardly less logical.

The Department does not quite share the view expressed by the German negotiators to the effect that paragraph 2 appears to be something in the nature of a good-will gesture without binding commitments. It would expressly commit the parties to an agreed course of action which, though framed in very general and flexible terms, is a clearly indicated course of action in fulfillment of the principle that the discoveries of science should not be hoarded but should be made available to help mankind in its struggle for a better existence.

U.S. High Commissioner for Germany
Bonn, December 16, 1953.

Copy to:
EU:GER:GEA
E:OD
PA:OD
OGC: Mr. H.S. Lay
E:FNP

E:CAD:CHBoehringer:maa
Tel. Mehlem 3265/66

(Original initialled CHB)

Second Note Dated December 16, 1953
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Minis'ry of Foreign Affairs, and his [sic] the honor to refer to its first note dated December 16, 1953, and previous notes, containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

In accordance with instructions from the Department of State, this Office is now in position to transmit to the Ministry the Department's comments on the German proposed Articles 6, 7, and 8, the German and English versions of which were made available to the American negotiators during the course of the October 26 meeting. It will be recalled that the German negotiators, during the October 29 meeting, stated that the proposed three articles were not, as previously understood by the American negotiators, intended to be replacements for Articles VII and VIII and paragraph 3 of Article XXII. Regarding Article VIII, it wll be recalled that the German negotiators suggested that it be eliminated entirely.

The Department observes that, since the German counterdrafts are merely illustrative and preliminary, its comments thereon at this juncture are in the nature rather of preliminary observations and queries than of an exhaustive analysis. The Department notes that it cherishes an attachment to the standard draft Articles in question, these being the fruition of lengthy study and experimentation. Consequently, and for the further reason that the proper presentation of the subject matter of Article VII is most crucial from the standpoint of

achieving a good treaty, proposals for substantial change are not to be lightly regarded.

Referring first to the general explanation given by the German negotiators of the theory underlying the counterdraft articles, the Department seriously questions whether the U.S. standard draft suffers the "logical deficiency" indicated. In fact, the standard

draft

[End of page]

draft fully provides for the specific factors and conditions appertaining to the special nature of juristic, as compared with natural, persons. The question is not, however, a concern solely of Article VII. To the contrary, it is the concern generally of all Articles in the treaty where the rights of juristic entities ("companies", in the standard-draft parlance) are dealt with: for example, Article V (1), Article V (2), Article VI (1), Article VI (2), Article VI (3), and so on for many instances throughout the treaty. If the identification of juristic entities need be the phrase "juristic persons, corporations and companies in Civil and Commercial Law having their seat within the territory of the other Party and existing legitimately under its law" in connection with Article VII subject matter, the same awkward and lengthy identifying phrase would logically have to be employed also in the many other Articles and paragraphs containing mention of such entities. The result would be a cumbersome and verbose document; and the Department cannot visualize why either side should desire that result.

In the opinion of the Department, the standard draft technique is the simple and convenient one of using the single word "companies" to cover all juristic entities of treaty concern; and then to define this term in one paragraph (3) of Article XXII, where there is ample room to deal with the matter as fully as may be desired. The Department suggests that if this definition

is in any way deficient or faulty, the German negotiators are free to propose necessary changes in it.

The status nascendi of a juridical entity is provided for in the second sentence of Article XXII (3). Since such status nascendi (i.e., its legal existence) presumably must be established with reference to a corporation's access to the courts, its acquisition of property, its subjection to taxation, its receipt of compensation owing from expropriated property, et cetera, as well as with reference to its right to do business, the necessary provision therefor is properly the factor of a general "tent" provision such as Article XXII. The status nascendi is, therefore, not the concern of Article VII (3); and the Department indicates that it has some difficulty in understanding the basis for the German objection to it. The "special formalities" envisaged by Article VII (3) start at a point where the legal being of the natural person or the juristic entity is granted (though, of course, one of the formalities could be requirement of documentary proof of nationality in the case of an individual, or of the corporation's legal existence under the laws of its creation, in the case of a juristic entity).

(Examples of the type of thing that such formalities might include are given in this Office's note of December 9, 1953, transmitting the views of the Department of State on Article VII regarding business activities of persons and companies).

In

[End of page]

In the light of the above reasoning, in the opinion of the Department, the German proposal lacks foundation, if the representation of the purpose actuating their draft is taken at face value and properly understood by the American negotiators. On this showing, the separation of the treatment of individuals and juristic entities tends merely to breed repetition, assuming that the bifurcated German scheme should, as suggested, accomplish just what the unitary standard draft

version is designed to accomplish, for the latter is calculated to give individuals and juristic entities alike essentially parallel rights to engage in a broad array of economic activities. The Department ventures to express its opinion that the German counterdraft articles do not appear to accomplish the design of the Department's standard proposal.

Without at this time going into details and subsidiary points of difference, it will suffice, the Department notes, to indicate that the German counterdraft articles provide no treaty rights to any business corporation of either party to establish itself within the other or to engage therein in any activity on terms of equality with its legal competitors. The proposed Article 7 consists of a first paragraph that is considered irrelevant and does not belong here, as the subject matter is covered in Article V (1) and Article XXII (3); a second paragraph reserving to each party an unqualified "screening" right, that is, freedom of action to refuse admittance to the other party's business companies for any reason or no reason, or to impose onerous conditions upon their admittance; and a third paragraph in effect assuring non-discriminatory treatment to an admitted enterprise only to the extent of the operations which it conducts within the scope of the limitations that might be imposed upon it at admission, under the second paragraph.

On balance, the Department observes, the three counterdraft articles, 6 through 8, give the appearance of being more concerned with restriction, limitation and reservation than with the basic treaty objective of establishing positive rights, most especially rights conducive to the flow of investment capital, which, at present, is largely in the form of corporate, rather than individual, capital. Fundamentally, the major treaty right contemplated appears to be most-favored-nation treatment, as indicated in the proposed Article 8.

While this Office believes that a correct report of the German presentation of the counterdraft Articles 6, 7, and 8, was transmitted to the Department of State, and that the Department has

commented

[End of page]

commented on all important statements made in the presentation, as well as on the proposed articles, the possibility exists that the German negotiators may have additional explanatory information to give in support of their proposed articles. Should this be the case, this Office is prepared, of course, to transmit such information to the Department for further consideration of the articles.

U.S. High Commissioner for Germany,
Bonn, December 16, 1953.

Copy to:
EU:GER:GEA
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PA:OD
OGC—Mr. H.S. Lay
E:FNP
E:CAD

E:CAD:CHBoehringer:mm
Tel. Mehlem 3265/66

(Original initialled CHB)

Note Dated February 5, 1954
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to its second of two notes dated November 4, 1953, containing, in part, comment from the Department of State regarding various points raised in the discussions held on October 5, 1953, between representatives of the German and United States Governments, in connection with the proposed treaty of friendship, commerce and navigation between the two countries.

Specific reference at this time is made to that part of the note cited above which deals with Article III of the U.S. standard draft relating to protection of persons.

It is suggested that paragraph 1 be modified to read as set forth below, with the added language underscored:

> "Nationals of either Party within the territories of the other Party shall be free from molestations of every kind, and shall receive the most constant protection and security. They shall be accorded in like circumstances treatment no less favorable than that accorded nationals of such other Party for the protection and security of their persons and their rights. The treatment accorded in this respect shall in no case be less favorable than that accorded nationals of any third country or that required by international law."

The purpose of the change proposed is to clarify this provision of the treaty in a manner consistent with the juridical systems of our two countries.

U.S. High Commissioner for Germany,

Bonn, February 5, 1954

Copies to:

EU:GER:GEA
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PA:OD
OGC—Mr. S.H. Lay
E:FNP

E:CAD:HWalker, Jr./OGC:SHLay;eu

(Original initialled CHB)

Note Dated February 8, 1954
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to the discussions held in the Ministry on January 4, 1954, between representatives of the German and United States Governments, in connection with the proposed treaty of friendship, commerce and navigation.

Specific comment is made herein with respect to the discussion on Article II, paragraph 1, of the United States standard draft treaty, concerning entry and basic personal rights.

According to the Department of State, the basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation.

In this connection, the important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other

treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under 22 Code of Federal Regulations 41.70, 41.71 and other applicable regulations.

The apparent

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RESTRICTED -2-

The apparent discrepancy between the treaty and the Immigration and Nationality Act with respect to use of the term "substantial" is of no legal or practical significance either when considered in the treaty trade clause alone or taken together with the treaty investor clause. Use of the term "substantial" in the treaty trader provision of the Act merely gives explicit recognition in the law to an administrative practice of long standing. It was not deemed necessary to reword the treaty as a consequence, for the treaty provision as now worded has long been applied in a manner requiring that the trade for which entry is permitted shall be substantial in character. This does not derive from Article II (1)(c), however, but from Article II (3), taken together with the general right to apply reasonable and non-discriminatory regulations consistent with the intent and purpose of the treaty provision in order to implement the commitment and to protect the privileges accorded thereby from abuse. In the case of the treaty investor provision, however, the term "substantial" has been carried over from the law to the treaty as an aid to its construction and implementation. This was done simply because the investor clause, unlike the trader clause, is new and an established body of interpretation has not yet developed.

It may be noted in connection with hypothetical cases involving substantiality of trade that this requirement is applied in a liberal manner. In determining the substantiality of

the trade within the meaning of the treaty trader clause, monetary or physical volume are not used as the exclusive criteria. The intent is to assure that the trade in question is not a brief, isolated excursion into international trade but a substantial volume of bona fide commercial transactions. Consequently, the number of transactions, the continuous character of the operations and a number of other factors are taken into consideration as well.

The observation made by Dr. Paulich, German Consul stationed in New York City and present during the January 4 discussions, that the fixing of the period of sojourn for aliens entering the United States as non-immigrants is done by the immigration officers at the port of entry rather than by consular officers when the visa is issued is correct. However, this procedure is specifically required by law and hence is not merely a matter of administrative convenience. Section 214 (a) of the Immigration and Nationality Act expressly vests the Attorney General with authority to prescribe by regulation the period of time for which non-immigrant aliens may be admitted to the United States. A treaty trader or treaty investor, by reason of the purposes of the treaty, is regarded as admitted on an indefinite basis as to

sojourn

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RESTRICTED -3-

sojourn, provided, of course, that he maintains his status as a trader or investor under the treaty. Hence the administrative regulations governing entry and sojourn (8 Code of Federal Regulations 214e2) contain no specific limiation [sic] as to time. This does not preclude, however, requirements that the alien comply with reasonable procedures designed to assure that he is maintaining his status as a treaty alien or otherwise complying with the conditions of his admission.

U.S. High Commissioner for Germany,
Bonn, February 8, 1954

Coordinated with: OGC—Mr. Lay
SUPCONGEN—Mr. Livornese

Copies to:
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Tel. Mehlem 3265/66 (Original initialled CHB)

Note Dated February 9, 1954
(Ex. 12)

RESTRICTED

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

The Office of the United States High Commissioner for Germany presents its compliments to the Federal Ministry of Foreign Affairs, and has the honor to refer to various notes sent to the Ministry during November and December, 1953, and containing comment from the Department of State regarding various points raised in the current discussions with respect to a new treaty of friendship, commerce and navigation between Germany and the United States.

This Office has now received comment from the Department with respect to the discussions which took place on November 16 and 27, 1953, regarding Article XI of the United States standard draft. This Article relates to the subject of taxation.

It will be recalled that, at the November 16 meeting, the German negotiators raised the question of relationship between paragraph 1 of Article XI in the Treaty and paragraph 3, Article XVIII of the proposed Convention between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income, and suggested that, for purposes of uniformity, the same text should be used for, or incorporated in, paragraph 1, Article XI.

The Department is of the opinion that there is no need to make the proposed substitution since there is no conflict between the two paragraphs; each provides a basic minimal standard of treatment and both can be applied simultaneously without disharmony or confusion, during such periods of time as both instruments may be in force. It may also be noted that substitution would encounter serious mechanical difficulties in

view of marked linguistic differences between the two paragraphs.

As the Department believes that the treaty under negotiation and the above cited Convention supplement and reinforce one another, without conflict, it does not perceive the advantage of adopting the suggestion made by the German negotiators that a sentence be added to paragraph 1, Article XI, stating that the Convention should prevail

for taxation

[End of page]

for taxation matters. Such a sentence, it is believed would appear to imply that paragraph 1, Article XI, would be suspended during the effective period of the Convention. In the opinion of the Department, it seems highly doubtful that any provision concerning the relationship between the two instruments is needed.

In the event, however, that the German negotiators believe that a cross-relationship provision is necessary, the Department would be willing to consider a protocol provision framed in the sense that where an actual conflict develops between the two instruments (in the sense that the provisions of both cannot actually be applied at one and the same time in a given situation), the Convention would prevail.

With respect to the proposed addition of reference to "under comparable circumstances" in paragraph 1, the Department is of the opinion that the idea sought to be conveyed is implicit in the draft. However, if the addition is considered desirable for translation reasons, the Department would not object in principle. If made, the Department would prefer the wording thereof to be revised to read "in like situations", to conform with the phraseology of paragraphs 1 and 2 of Article XXII. Further, if added to paragraph 1, Article XI, the phrase should also be added in the same way to paragraph 3.

During the course of the November 27 discussions, the German negotiators inquired: "Would Germany benefit from specific tax advantages the United States might wish to extend to Mexico, for example, on the basis of reciprocity?"

According to the Department, the answer to that question is affirmative, subject to the proviso that Germany meet the reciprocity test. The question relates to the meaning of sub-paragraph (a), paragraph 5, the main effect of which is to make the most-favored-nation clause of paragraph 3 conditional, by way of exception to the general rule, as stated in the Preamble, that the most-favored-nation clauses of the reaty [sic] are unconditional. Thus, sub-paragraph (a) could be read as though it recited: "Notwithstanding the provisions of paragraph 3 of the present Article, each Party reserves the right to accord specific advantages as to taxes, fees and charges to nationals, residents and companies of third countries on the basis of reciprocity, provided that nationals, residents and companies of the other Party shall be entitled to the same advantages on the same basis."

A Party

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RESTRICTED -3-

A Party has an assured treaty right to an "(a)" type advantage on showing of the requisite reciprocity. A "(b)" type advantage, by contrast, is attainable only through negotiation of a specific double-tax convention, which neither Party is obligated to undertake or bring to completion unless it so wishes. Examples of "(a)" type advantages in United States revenue law include: income tax exemption on income derived from shipping profits by non-resident aliens; exemption from excise on oil, gasoline, at cetera [sic], used by foreign civil aircraft.

In framing paragraph 5, however, the Department did not confine the reservation to paragraph 3 for the reason that in some instances the national treatment rule might also be considered to be involved. An obvious example is afforded by

sub-paragraph (c). Another, relative to sub-paragraph (a), is the provision of 26 of the United States Code 131 (a)(3) which stipulates, in connection with the income tax, that resident aliens shall be allowed the usual credit against foreign income taxes only if their country allows a like credit to Americans there residing in connection with any income tax it may levy.

The German request for a memorandum on matters solely within the competence and jurisdiction of the individual States, as opposed to the Federal Government of the United States, in order to establish all the issues for which the Federal Government could not enter into obligations which would also be binding on the States, may be simply answered. Article VI of the United States Constitution recites: ". . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . anything in the Constitution or Law of any State to the contrary notwithstanding". As a generalization, therefore, it can be stated that the treaty power of the Federal Government of the United States is plenary as to all proper subjects of normal international negotiations, notwithstanding the reserved powers of the States. There is no question of the competence of the Federal Government to make binding treaty rules as to the provisions proposed for inclusion in the treaty now under negotiation.

As to the impact of the rule of Article XXII, paragraph 4, upon the tax Article, it should be pointed out that the purpose of this rule is to equate the alien corporation to the American out-of-State corporation. As a practical matter, this places the alien corporation on a par with the bulk of its competitors, in view of the way that business has now come to be conducted typically on an interstate basis

in the

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in the United States; and it is proper that the treaty should be adapted to the economic realities. Juridically, the rule avoids

the confusion that would result if one group of "foreign" corporations (corporations chartered in foreign countries) were treated as "domestic" by way of exception to the regime generally followed with respect to "foreign" corporations in the sense of those chartered in other States of the Union. From the viewpoint of policy, the rule avoids unnecessary treaty interferences with the normal functioning of the Federal system of the United States. In light of United States constitutional jurisprudence, and the business life in the United Sates [sic], the rule imposes no consequential inconvenience on the alien corporation; and a different rule would constitute an interference with State prerogatives without compensating advantage. Finally, from the viewpoint of expediency, it is probable that the Senate would regard a different rule as unwarranted and unacceptable.

Moreover, the rule of Article XXII, paragraph 4, would afford certain positive advantage to German corporations in the taxation field. A State is free to tax its own corporations on their entire income, wherever derived; but, under the Constitution as interpreted by the courts, a State can tax a corporation of a sister State only on that part of its income derived from within that State. It is reported that Alabama, Louisiana and North Carolina actually do exercise their right to tax their own corporations on their entire income, irrespective of source (Altman and Keesling: Allocation of Income in State Taxation, pp. 17-18, 61), and other States (for example, Arkansas, Mississippi, and South Carolina) have so done in the past notwithstanding the discriminatory burden that may thereby be placed on their domestic corporations. Again, according to figures taken from Tax Systems (Commercial Clearing House, 1940, pp. 256-260) no less than 17 States had annual franchise taxes that weighed more heavily on their domestic corporations, in that the tax was levied on total capitalization wherever employed, although the tax could be levied only on the capitalization employed within the State in the case of corporations chartered in sister States.

Constitutional protection is afforded the American out-of-State corporation, of course, not only by the commerce clause, but by the "due process" and "equal protection of the laws" clauses as well. The proposed treaty rule would assure that protection to the German corporation, by equating its status to that of American corporations operating outside their State of charter.

U.S. High Commissioner for Germany,
Bonn, February 9, 1954

[End of page]

RESTRICTED -5-

Coordinated with: E:FNP—Mr. Brown (Cleared in draft)
Mr. Walker

Copies to:
EU:GER:GEA
E:OD
PA:OD
OGC—Mr. Lay
E:FNP

E:CAD:CHBoehringer:eu
Tel. Mehlem 3265/66 (Original initialled CHB)

Exhibit 13

[Comment: Initials "HW" appear in upper right hand corner, with two check marks and "X4511"]

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OFFICIAL-INFORMAL September 16, 1955

Dear

The Department's reply to your 208 ought to be on its way by now. The extra copy you sent direct expedited the reply, since it helped us get set. When the yellow arrived, and provided the necessary file copy, that enabled the yellow to be released prior to processing and distribution of the file copies made here.

Your letter of September 12 arrived this morning with the trial-balloon redraft protocol text (the one previously numbered "12" but which is carried as "11" in the FOTO-Btz. 118588 sent under cover of your June despatch 1190). The language, quite apart from being out of the general style of the treaty, is very hard to follow. I read it one way, my boss another and my legal counsel still another, on first impression, though a painful study of it, with the aid of some additional punctuation and the filling of an elision, seems to produce a coherence. But what it actually says, (namely, *inter alia*, that "controlled companies" get as good treatment as their parents) is not what [blank] apparently intends it to say—if I understand correctly the statement in your letter that what he wants, first of all, is that "controlled companies are in fact companies of the country in which they are located". [Comment: "that "controlled companies" get . . . located" is underlined in handwriting]. This I take to mean that a Dutch-controlled American company is to enjoy the same rights of acquiring and owning real property as an American-controlled American company, notwithstanding some State laws to the contrary. I thought they understood by now, and for a long time past, that

any such thing is out of the question. We will not agree to rights in property either directly or indirectly going beyond the limits set by paragraph 1 of Article II for alien individuals, or for alien companies, or for alien-controlled American companies. As you know, and as the Ambassador I think made quite clear last February, that's final.

Esquire,
Counselor of Embassy for Economic Affairs,
American Embassy,
The Hague, Netherlands.

[End of page]

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-2-

Maybe [blank] did not mean this, but only to provide what the unadorned words of the draft in their face seem to mean: namely, that "controlled companies" would be assured (a) most-favored-nation treatment, in the sense of treatment as good as that given companies of third countries; (b) further most-favored-nation treatment in the sense of that given other "controlled companies", i.e., those controled by third-country nationals; and (c) treatment as favorable as that enjoyed under the treaty by parent companies. Earlier (the last time being at the farewell meeting of March 10), when it seemed possible that we might solve all our negotiating difficulties by some kind of formula, we discussed the possibilies of some kind of draft that would meet these three points, subject to solution of problems of a technical nature (e.g., the problem of Article II, paragraph 1, and Article II, paragraph 4). I believe at one time or other, when the negotiation had momentum, I sketched out for them a form of wording which would accomplish this defined objective, clearly and in a manner consistent with the style of the rest of the treaty (for references and a summary, see the last two paragraphs of A-309, of May 27). But the last Dutch word was "totally unacceptable", or words to that effect ([blank] speaking, at our March 10 farewell meeting).

So, in light of this, and the remarks made in your letters of June 23 and September 12, I don't see that we are any forrader. They have refused to accept a clean-cut, unambiguously worded formula, or one which meets the technical problems; and what they do offer seems at best pregnant with future disputes.

I add to this the observation that the time for trying to finagle around with a magic formula now seems definitely past. There's a "time and a tide"; and the more they keep on trying to pull us forward, the more we are pulling back in resistance. At this juncture, the Department will subject everything they propose to the most meticulous critical scrutiny; in any case, technical problems remain, and I do not know what solutions there are for them. If [blank] would like my opinion, then, I'd say let's abandon this endless and profitless search for a formula. To paraphrase the Veep, the thing's now a "cold biscuit" beyond a rewarming.

Let's ask: What is it, exactly, that they want? Evidently, the broad "controlled company" formula is simply a circumlocution for building up the real property article through the back-door, so to speak. This is evident not only from the negotiating history, but also on grounds of logic. The heart-provision of the treaty already provides amply for the rights of controlled companies (namely, the major provision on the business activities of companies; see Article VII, paragraph 1, clause (b) and (c) and last sentence). They appreciate this. At least, apart from the non-applicability of Article VII to real property, they have never indicated any dissatisfaction with this article in the "controlled company" context.

The next treaty provision of first importance is that on expropriation (VI-4). Here again, through a standard protocol (numbered "7", I believe, in the latest available draft), the "controlled company" is

cared for,

cared for, as is also the case with the two other protection-of-acquired-property provisions in Article VI in which the Dutch have shown a "controlled company" interest. The only one left is the property article; they've never pointed to any other provision where they feel they need "controlled company" protection. As regards the property Article (II), there is no solution in delicately avoiding pointing the finger at it; the Department is going to judge any formula by looking behind its surface to see how the article might actually be affected by it. Within the limits set by the Department's well-known and fixed position concerning this Article, there is latitude for only two accommodations. First is an assurance that "controlled companies" get as good treatment as their parents are vouchsafed. They proposed this long ago, and we accepted the proposal; but since then they changed their minds about it. I guess the offer is still open, if they want to come back to it. Secondly, they have been concerned lest at some future date our policy might be liberalized in a treaty with some other country; and they would want to be able to pick up such liberalized rights. This is obviously a question that concerns not merely "controlled companies", but also Dutch companies proper and Dutch citizens. In mulling this over here a while ago, our legal advisers' office came up with a fresh suggestion: namely, that we could have a side letter, undertaking if the Dutch desired [Comment: handwritten word "consultations" inserted here] under Article XXV-1 (old XXIV) about the matter. The purpose, of course, would be to negotiate a Protocol with a view to bringing the Dutch treaty abreast of the other treaty in question.

A mild remark I ventured at our last meeting, in discussing the problem posed by a sweeping and indefinite formula, is worth repeating and emphasizing: namely, if there is some other paragraph or article of the treaty about which they have "controlled company" worries, they ought to identify the

same. These treaties consist of a long array of specific provisions, each dealing with a defined subject-matter in a carefully formulated way. The standards of treatment, properly applicable, and the qualifications and reservations which are deemed pertinent, can thus be varied accurately from subject to subject. This is because, in the comprehensive sweep of such an instrument as an FCN treaty, the parties need to be able to visualize with some confidence exactly what they are undertaking.

[Comment: Word "A" crossed out and handwritten words "As a" inserted] proposition becomes too broad, it gets to be unmanageable in terms of visualizing the contingencies. When this matter of providing that a controlled-company enjoys parent-company rights first arose in connection with real property, it could be confidently visualized that the principle was acceptable, because the mind could be focussed on one mensurate problem. But, then, when last March it was proposed to extend this proposition to the whole treaty, reservation became appropriate. At the time, it immediately came to mind that this would give a Dutch-controlled American company special privileges under II-4 with respect to apportionment of income not enjoyed by an American-controlled American company—a result which both sides concede to be inadmissible. Since starting this letter,

a couple

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a couple more such problems have come to mind. (1) Under Protocol 2, a person to be entitled to a visa must be an employee of a Dutch company. The Dutch-proposed protocol would give a Dutch-controlled American Company an advantage over the American-controlled American company, which

poses not only a question of discrimination but of our immigration laws and regulations (I give this merely as an illustration of a possible problem which may or may not be difficult). (2) Would the most-favored-nation feature of the broad wording serve to override the exception for double-tax conventions in Article XI(5)? This, again, would clearly be an inadmissible result. How many more such discrepancies would there be? No one can tell. Prudence and orderly treaty procedure, if nothing else, therefore makes it highly advisable that any "controlled company" adjustment be dealt with only in terms of designated provisions. [Comment: "Prudence . . . provisions" is underlined in handwriting].

The Argentine treaty problem may be recapitulated as follows. That treaty, dating from 1853, contains a broad national treatment clause, applicable to "nationals", with respect to acquisition of real property. Inasmuch as since that date established U.S. treaty policy has been limited to that reflected in Article IX-1 of the Dutch treaty, we have had to avoid accepting most-favored-nation clauses that would in effect extend the Argentine right to other countries so long as the Argentine treaty remains in force. At one stage in the discussions the Dutch tried to get for themselves this Argentine right through an M-F-N clause. What I told them was that we would not accept any M-F-N clause that in our opinion would permit them to pick up the benefits of the Argentine treaty. They said they were proposing an M-F-N as to "controlled companies" only, and that their objective would be to get this advantageous treatment only for "controlled companies". I said I believed we could entertain a "controlled-company" M-F-N clause, all right (and indeed the Department gave us telegraphic authority at the time, summer of 1954, to do so; see the citation in the Department airgram above referred to). However, we would be doing so because merely a "controlled company" M-F-N clause would not get them anything from the Argentine treaty, for the reason that in the Department's opinion that treaty applied only to natural persons, and did not give any rights to companies. When [blank] questioned whether that was a proper

interpretation of the Argentine treaty, I said we would make him a sporting proposition: namely, we would accept a "controlled-company" M-F-N clause on property, making clear in the negotiating discussion our opinion as to its inapplicability to the Argentine treaty, and that if he wanted to litigate the question after the treaty came in force we'd be willing to take our chances the courts would uphold our interpretation. It's only in this sense that the Argentine treaty provision is "available" to them.

I guess I've rambled along more than enough; but I figure it might be useful to you to draw together a story which would otherwise have to be pieced together, and then perhaps only imperfectly, from various scattered fragments in the record. I guess I wouldn't particularly

mind if

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[End of page]

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mind if [blank] saw this letter privately, except as it might contain something unintentionally susceptible of giving umbrage and that you can probably better tell him orally whatever ought to be said. Please remember me kindly to him when next you meet.

Sincerely,

Trade Agreements and
Treaties Division

ITR:TAD:
9/16/55

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Exhibit 14

[LETTERHEAD OF THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA]

[SEAL]

OFFICIAL USE ONLY

OFFICIAL-INFORMAL

AMERICAN EMBASSY
The Hague, Netherlands, September 28, 1955

Dear

I have just had a long discussion with [blank] during which I revealed the substance of your letter of September 16, 1955 using your colorful words to convey part of it. However, I did not let him read the letter. Indeed, it was unnecessary to reveal all of your letter because [blank] assured me that they are not seeking to obtain through a "magic formula" what they were unable to get during the earlier negotiations. He said that the reason for his more general wording in the draft Protocol was merely to insure that Dutch controlled companies will be assured of a) the treatment given to parent companies and b) most-favored-nation treatment. Indeed, he said that the points "a", "b" and "c" made in the first paragraph, page 2 of your letter are in fact what they are seeking. However, I understood from our earlier conversation that they were also seeking national treatment as reported in my letter dated September 12. I do not doubt the sincerity or accuracy of his present statement of intent. We should take it at face value.

He indicated also that they would like to get something along the lines of the Argentine Treaty provision; hence paragraph 4 of your letter was particularly helpful. I read the first half of the pertinent paragraph to him.

[blank] at first suggested that we prepare a new proposed wording but I turned back the request suggesting that he take another look at the so-called American Draft. At the same time I emphasized that if they still insist on a protocol to cover this point, it should be unambiguous and directly pointed to the two points which they wish to cover; namely, parent company and m-f-n treatment.

[blank] tells me that he has started the translations. Today he gave me "Clean" copies of the Treaty dated September 1955, FOTO-Btz. 90986. A copy is enclosed herewith for your information. No Clean Drafts were given for the Protocol and enclosed letters. Four copies of the Clean Draft Treaty are being transmitted to the Department under cover of a despatch.

Cordially yours,

[name blank]
Counselor of Embassy
for Economic Affairs

Enclosure:
As indicated above.

Esquire,
Commercial Policy Staff,
Room 600—SA-7,
Department of State,
Washington 25, D.C.

Exhibit 15

[Comment: Illegible handwriting upper right hand corner of page]

OFFICIAL USE ONLY

OFFICIAL-INFORMAL October 28, 1955

Dear

As promised in my hurried note of yesterday regarding the possibility of a look in at The Hague by [blank], Assistant Legal Adviser for Economic Affairs, there is enclosed a copy of Beelaerts' letter of October 22 for your file and use. The red pencil marks are as in the original.

I think I appreciate, and have appreciated, the intended purpose and origin of [blank]' draft and would not be inclined to contest the general viewpoint set forth on his first page, if I read it aright. One thing a rewriting of someone else's formulation accomplishes is to reveal precisely whether there is a common understanding of intent and purpose; and I guess our last counterdraft helped along that process. The new facet clarified is what he had meant some while back when he told you that "controlled companies" should in general be treated as any other domestic company. What he evidently means is that he simply does not want a formulation which would seem to detract from the extent [Comment: handwritten "to" inserted] which "controlled companies" are equated to domestic companies under the treaty or under legislation—a proposition which, as stated, does not run afoul of the Department's unwillingness to extend the limits of Article II on real property. I am glad that now we have an elucidation that clears up the seeming conflict between the general proposition regarding "controlled companies" and its specific application to real property.

In my undated letter transmitting the redraft of [blank] proposal (which letter should have borne the date October 14), I made the point that, despite a superficial appearance to the contrary, the legal adviser's formulation of the proviso to be inserted in Article XXIII paragraph 3 was not calculated to detract in any way from the rights and privileges a "controlled company" would otherwise enjoy. That was the significance of my remark that the treaty is always a floor and not a ceiling. The effect of the legal adviser's

formulation

[blank], Esquire
Counselor for Economic Affairs,
American Embassy,
The Hague, Netherlands.

[End of page]

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formulation was to assure that the "controlled company" will always, as a minimum, get everything that the parent company gets as a matter of treaty right—but was not calculated to detract from any additional privileges that the "controlled company" may actually have. I took the pains of pointing this out in order to anticipate just such an objection as [blank] raised in the first page of his October 22 letter. I hope you will mention this to him, so as to allay any misapprehension he may be under as to our appreciation of the point. The Department has the same interest as he in avoiding damage to the position of "controlled companies", because Americans have "controlled companies" abroad just as the Dutch have them in U.S.

If it works out that [blank] can drop by The Hague, I see no reason why he and the Dutch should not be able to reach an amiable meeting of minds around the table on just how best to formulate and handle the matter. If it does not prove feasible, for one reason or another, for [blank] to come by, I will take

the matter up further with his office to see what else we might be able to do to meet [blank]' concern.

Now turning to the second page of [blank]' letter —the first and second paragraphs thereof—I just do not understand what ground he has for complaining at all over what we drafted there. It is very clear that his draft dealt with two subject-matters and [Comment: handwritten word "that" inserted] there was a certain overlap and duplication in it. It also seems very clear to me that clarity and avoidance of confusion dictate the separate handling of these two elements, as well as revisions which would eliminate the overlap. I just don't see how there could be any debate over such a procedure. Secondly, since the acute policy problem over Treaty provisions on property is a U.S. problem, I do not think he ought to quarrel with the Department as to the place in the Treaty where the provision relating to real property should go. There is no question that we intended to provide, and actually did provide, in our counterproposal of October 14, all of the substance of his proposal in this connection. So, I think he should amiably concede us the matter of form, about which we have to make judgments governed by U.S. domestic considerations.

As to the third paragraph on the second page of his letter, it seems possible that our redrafting touched a nerve. He seems to be protesting rather more vigorously than called for. I am relieved that it is not the Dutch intent to write into the Treaty rights for companies organized under the laws of third countries (e.g., a Dutch-controlled Argentine company). However, I quite well recall that at one time in the negotiation (July 1954) [blank] very definitely sought to have such a proposition recognized in the Treaty. For two reasons, therefore, it is my own conviction that we ought to be jolly well certain that any general formulation we put into the Treaty on "controlled companies" make this point clear on its face. (These reasons are (a) a negotiating record of a Dutch effort to include rights for "controlled companies" chartered by third countries, and (b) the desirability of making the intent of Treaty provisions clear on their face wherever possible, so as to avoid mistaken

interpretations by those who may not be familiar with the tacit understandings reached during the negotiations. Unless it is clear on its face that "controlled

companies"

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[End of page]

-3-

companies" of third countries are not included, I think a judge could very fairly conclude that they were.)

I cannot agree with [blank]' assertion that wherever the Treaty makes mention of "controlled companies" the language is silent as to whether companies of third countries are included. Let us take them up, one by one. Article VII, paragraph 1, in its second sentence clause (B) speaks specifically of "controlled companies" of the receiving Party, [Comment: "of the receiving Party" underlined by hand] to the exclusion of companies of third countries. Because of its position, this is the governing rule in the matter for the whole Article. We have made only one limited departure from it [Comment: handwritten word "in" inserted] deference to one of [blank] requests: namely, we have agreed to recognize that the chain of control can be "through one or more intermediaries". This concession, however, is irrelevant to the point at issue, and, if anything, it serves only to emphasize the need for our intent [Comment: handwritten words "to be" inserted] clear in any general rule on "controlled companies" we might add to the treaty. The other specific reference to "controlled companies" is in Article XVI, paragraph 2, which recites "companies of the latter Party [Comment: "the latter Party" underlined by hand] controlled by such nationals". There remains Article VI and the Protocol relating thereto. The Protocol concerns the very special matter of piercing the corporate veil for purposes of assuring compensation with regard to expropriated interests in property. It has nothing to do with the treatment accorded to "controlled companies" as such. Finally, in the last sentence of Article VI,

paragraph 5, we are not writing a rule in terms of "controlled companies" but in terms of "enterprises" in which there is a "substantial interest", for a very particular purpose having to do with the protection of vested property rights. This is no precedent whatsoever for the content and framing of a broad rule regarding the rights generally of "controlled companies", [blank]s' assertion, therefore, does not correspond with the facts.

The thing that we have "up our sleeve", to paraphrase [blank], is that we are going to be certain (I hope) that the Treaty wording correctly reflects our intentions in this regard. So, since [blank] has only the same thing up his sleeve, there should be no difference between us about having clear wording.

As to the penultimate paragraph of [blank]s' letter, there seems to be an inappropriate addition in the altered wording of the first sentence of his proposal; namely, the concluding clause reads: "than the nationals and [Comment: "nationals and" underlined by hand] companies of such other Party," whereas it should read merely "than the companies of such other Party". Nowhere in the Treaty do we propose to equate companies to nationals, but only to equate them with other companies. It would be inadmissible to do otherwise.

Sincerely yours,

[Comment: typewritten material on left side of page illegible]

Dept. of State

Trade Agreements and Treaty Division

Exhibit 16

COPY

MINISTERIE
VAN BUITENLANDSE ZAKEN
[blank]'S-GRAVENHAGE

October 22, 1955
143.143

Dear

I am afraid that either my explanation of our ideas was not clear or that our mutual friend [blank] is under a misapprehension as to the intent, purpose and origin of my draft.

We understood that the draft-treaty as it was discussed never referred to controlled companies except in some specific cases (art.6 par.5, art.7 par. 1 and 4, art.16 par.2). According to our view a [Comment: remainder of sentence underlined by hand] company constituted under the laws of either Party and controlled by nationals or companies of the other Party should be treated in the same way as a domestic company controlled by nationals and companies of the first Party. This principle has not been inserted as a general rule in the Treaty, but it appears in art.7 par.1.

Now in addition we want to make sure that American companies controlled by nationals or companies of the Netherlands will never be treated less favorably than their parent companies. Consequently, the possibility would remain that in appropriate cases these controlled companies might enjoy a better treatment than their parent companies. [Comment: first two sentences of third paragraph underlined by hand] The wording, which has been prepared in the Legal Adviser's Office is unacceptable because it does not leave this possibility open. Moreover it violates art. 23 par. 3. You will note that according to our views the Treaty does not deal with controlled companies as such except in the few specific cases mentioned above. The wording proposed by the Legal Adviser

would make the provisions of the Treaty directly applicable to them. And that is exactly the point, which we want to avoid.

We need, therefore, a phrasing in the negative that the treatment accorded to controlled companies will not be less favourable than that accorded to their parent companies, leaving open the possibility, which probably is the general situation, that they will receive a better treatment.

Mr. [blank]
I.C.A.—mission,
7, Benoordenhoutseweg,
The Hague.

Counselor for the U.S. Embassy for Economic Affairs

-2-

[End of page]

nr.143.143

The second point we should like to state in the Treaty is that for the specific case dealt with in art.9, —namely the acquisition, ownership, use and disposition of real and personal property of all kinds—, controlled companies be assured of most-favoured-nation [Comment: "most-favoured-nation" underlined by hand] treatment and a treatment which will never be less favourable than that accorded to their parent companies. [Comment: "never be less favourable . . . companies." underlined by hand] I should like to stress again that art.9 as such does not deal with controlled companies at all. That is the reason why we prefer our clear wording proposed to you in the second sentence of our draft as it is clear and cannot give rise to any misunderstanding.

In Walker's letter mention is made of the place [Comment: "the place" underlined by hand] where these provisions ought to be inserted. I take it that you are agreeable to the principle of these provisions. Personally I think that it would be wise to

leave it in the Protocol as it deals with a matter, which is not treated in the body of the Treaty.

A last point, which I think we ought to make perfectly clear is that we never tried to have treaty-rights conferred to for instance French or Argentine companies controlled by Dutch nationals. Of course the Treaty, being a bilateral Treaty between the United States and the Kingdom of the Netherlands could deal only with either American or Dutch companies. In the whole Treaty whenever mention is made of controlled companies the term used is: "companies controlled by nationals or companies of the other Party". That is the reason why I see no good reason unless one has got something up one's sleeve to change the wording in this Protocol provision and insert the words: "as constituted under the laws of the other Party".

I hope this all is perfectly clear and that it will enable Walker to appreciate our draft at its real value. Nevertheless I should like to alter slightly the wording of the first sentence of our draft to read as follows: "It is understood that, except with respect to Article II, paragraph 4, companies of either Party controlled by nationals and companies of the other Party shall in no case receive less favourable treatment within the territories of the first Party than the nationals and companies of such other Party."

I could not agree more with Mr. [blank] that tinkering with words does not seem profitable. Hence I should appreciate it very much if my amended draft could now be accepted by your people.

Sincerely yours,

(Signed informally)
Netherlands negotiator

Exhibit 17

DEA October 6, 1955

Treaty of Friendship 135.140

Dear Mr.

With reference to our conversation about the famous protocol-provisions no 12 I think perhaps the following wording might suit our mutual ideas.

[Comment: Following paragraph has handwritten designation "1" and handwritten bracket]
"Provisions establishing treatment for companies of a Pary [sic] shall be construed as establishing treatment no less favorable for companies controlled by nationals and companies of that Party.

[Comment: Following paragraph has handwritten designation "2" and handwritten bracket]
It is further agreed that, with respect to the acquisition, ownership, use and disposition of real and personal property of all kinds, within the territories of either Party, companies of that Party which are controlled by nationals and companies of the other Party shall be accorded treatment no less favorable than that accorded within such territories to companies of such other Party or to companies controlled by nationals and companies of, any third country."

You will see that a few changes have been made but I do not think essential ones.

I do hope that this will state clearly enough our view that although to our ideas controlled companies should enjoy

national treatment they in any case will enjoy no less favorable treatment than the parent companies and on the other hand—with regard to certain specified matters—most favored nations treatment.

Sincerely yours,

M.A.
Netherlands negotiator

Mr. [blank]
Economic Counselor of the U.S. Embassy
ICA-Mission,
7, Benoordenhoutseweg,
The Hague.

Exhibit 18

[Comment: Illegible handwriting appears on upper right of page]

OFFICIAL-INFORMAL November 8, 1955

Dear

Your letter of November 4 just arrived, and stimulated another effort regarding what further [Comment: handwritten word "must" inserted] be done to allay [blank] apprehensions regarding the wording of the general rule on "controlled companies" which the Dutch wish to have in the Treaty. With advice and counsel of members of [blank] staff in the legal adviser's office [Comment: comma handwritten after word "office"] we have decided that it would be agreeable to transfer the proposal back to the protocol from the suggested position in the definitions Article which had been communicated in my undated letter of October 14. Further [Comment: comma handwritten after word "Further"] we can accept generally the further revised wording last proposed by Beelaerts in this specific connection in his letter of October 22. After omitting the words "nationals and" from the last line, as he concurs would be proper, the provision reads as follows: "It is understood that, except with respect to Article II, paragraph 4, companies of either Party controlled by nationals and companies of the other Party shall in no case receive less favorable treatment within the territories of the first Party than the companies of such other Party." I might add that some incline to feel along with [blank] that this formulation may be indeed preferable in style, appearance and structure. So you need not feel any hesitancy about informing him of our receptivity; and I hope the issue may be disposed of now without more ado.

There appears no reason, however, that we should change our counterdraft with respect to the property part of [blank]' proposal. Our opinion on this remains as given in my letter of the

14th: namely, that it should be attached to property article, in the revised form set forth. I might add, however, that if it will make him feel better about it, we could agree to the insertion of the redundant phrase "real and personal" before the word "property", provided the same change is made in the sentence already appearing in Article IX, paragraph 5, so that the format and style of the paragraph will be consistent throughout. Furthermore, the phrase "constituted under the laws" can be deleted if he finds it objectionable, in as much as it is not indispensable and had been put in merely for emphasis.

As to the

[blank] Esquire,
Counselor for Economic Affairs,
American Embassy,
The Hague, Netherlands.

[End of page]

-2-

As to the possibility of [blank] calling by The Hague to effect a final settlement about these controversial matters of form and wording, if they do not clear up in the interim.—[blank] informs me that he will not be available while the Wheat conference remains in session, but only after it is over; and I gather that he does not prefer to stay away from home any longer than necessary. The present adjournment of the conference is scheduled for November 25. Although it might possibly run a bit over this date, we should make plans as though the November 25 target date will be realized. This means that we ought to know by the 18th, by cable if necessary, if it proves desirable and expedient in your opinion for him to stop off a couple of days on his way home, so that all arrangements can be made in good time. Against the contingency, we will now inquire of the acting legal adviser whether he would be willing to spare [blank] from Washington duties for

the necessary time, in case the occasion demands. I have not anticipated that there will be objections, but of course cannot know with certainity [sic] until the permission of higher authority has been secured.

Sincerely yours,

Trade Agreements and
Treaty Division
Dept. of State

[Comment: Handwritten insertion lower left
of page as follows: "cc: L/E-.
L/T-Misc."]

Exhibit 19

[LETTERHEAD OF THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA]

[SEAL]

[Comment: Handwritten words upper right of page: "File— Netherlands"]

OFFICIAL USE ONLY

OFFICIAL—INFORMAL

OFFICIAL USE ONLY

American Embassy
The Hague, Netherlands, November 4, 1955.

Dear

I was somewhat baffled by your letter of October 28 because there seemed to be no way of breaking the stalemate except by inviting one of our legal advisors to debate the wording of the most onerous portions of the Treaty. After considering all the possibilities, Andy and I decided that perhaps the best thing to do was to take your suggestion and request that Mr. [blank] come to The Hague. Nevertheless, I wanted to try once more; hence, I asked for an appointment with [blank]. I took with me quotations from your letter which I could leave with him, particularly the 2nd, 3rd, 5th, 7th and last paragraphs. I also told him of your suggestion that one way of breaking the stalemate on wording might be to get our legal advisors together. At the same time I told him we were not sure this could be arranged and would in any event involve a further delay.

[blank] readily conceded your point in the last paragraph. On the other points he reiterated the Dutch desire to have negative

wording and to cover the whole Treaty by using a protocol rather than by placing the two portions in Article IX and XXIII. I then reiterated our efforts to ascertain precisely what they were trying to get and affirmed my belief that you had earnestly sought to learn their wishes and to cover them in precise wording, no more and no less. I then asked whether there were specific objections to the proposals made in your letter of October 12 which [blank]s had not specifically mentioned in his letter of October 22. I pointed out that with respect to your suggestion that one portion be inserted in Article IX, [blank] had reacted only generally and without a specific reason, saying "That is the reason why we prefer our clear wording." He then indicated that one objection was your omission of the words "real and personal property" which had been included in his October 6th draft. At this point I deliberately demonstrated impatience. I told him that, in view of the background on this particular point, it is no small wonder that we are unable to reach agreement if

they

Herman Walker, Esquire,
Commercial Policy Staff,
Room 600—SA-7,
Department of State,
Washington 25, D.C.

[End of page]

OFFICIAL USE ONLY

they don't lay all cards on the table. Accordingly, it seemed to me that the next step would be for him to write out clearly in another personal letter all of the Dutch objections to the clean-cut proposals made in your letter of October 12. I offered to transmit such a letter for your personal examination in hopes of finding a way of breaking the stalemate. I reiterated your earlier statement that there is among our people a feeling of lack of confidence as

to Dutch intentions on this particular point and unless such confidence were restored, I saw little hope of a solution.

Only [blank] were present at the meeting with me. They agreed that it might be useful to follow my suggestion of another detailed and completely frank exposition. Again my fingers are crossed but I believe that this twist might prove to be useful.

Sincerely yours,

[Signature blocked out]
Counselor of Embassy
for Economic Affairs

OFFICIAL USE ONLY

Exhibit 20

DEA November 8, 1955

Treaty of Friendship 150.664

Dear

Further to our discussions of November 4th, we reconsidered the whole problem. I think there are two questions to be answered and they correspond to the two sentences of the Protocol-provision, which I submitted to your inspection.

I understood that the general provision as we drafted it and was redrafted by the Legal Adviser in Washington to make part of article XXIII, in your opinion was not acceptable, as it would be of too broad a scope and not pinned down to a specific article. Nevertheless there seems to be no problem as to the principle; the only difficulty being the wording and the place.

[Comment: The following paragraph is underlined by hand].

Consequently nobody would deny to a company controlled by nationals or companies of one of the contracting Parties the treatment, which is accorded to the parent company, except perhaps in a very special case e.g. taxation. I think that a psychological question comes in when we try to formulate this general principle. As the principle is generally accepted I think it would be superfluous to spell it out. Therefore there seems no objection to leave out the whole matter. I think this will solve the first problem.

The other problem refers to the second sentence, which also has been redrafted by the State Department's Legal Adviser. As the wording of this provision is fairly close to what we proposed, I think we could accept that kind of language, although we should like to have inserted in this provision the general rule about the treatment not less favourable than that accorded to the parent company as referred to above. I think it makes sense to insert it here as the parent companies are specifically treated in par. 1 in art. IX.

As to the place where we should insert the provision as drafted I think an insertion in art. IX would be acceptable.

-2-

Economic Counselor U.S. Embassy

Mr. [blank]
I.C.A.—Mission,
7, Benoordenhoutseweg,
The Hague.

[End of page]

-2-
8-11-'55
150.664

Although I think that no objections will be raised in the Netherlands I must make, of course, the proviso that the whole treaty as such will have to be accepted by the Netherlands Government.

In order to make things absolutely clear I insert here the text, which according to our ideas would not meet any objections from United States' side.

Art. IX, par. 5, a second sentence: "Furthermore, with respect to the acquisition, ownership, use and disposition of property of all kinds within the territories of either Party, companies constituted under the laws of that Party, which are controlled by nationals and companies of the other Party, shall be accorded treatment no less favourable than that accorded within such territories to companies of the latter Party or to companies similarly constituted which are controlled by nationals and companies of any third country."

Sincerely yours,

M.A.
Netherlands negotiator

[Comment: Illegible handwriting appears on left side of page].

Exhibit 21

[Comment: Handwritten words "File—Netherlands" appears upper right of page].

[LETTERHEAD OF THE FOREIGN SERVICE OF THE UNITED STATES OF AMERICA]

[SEAL]

UNCLASSIFIED

OFFICIAL-INFORMAL

AMERICAN EMBASSY
The Hague, Netherlands, November 14, 1955

Dear

Your letter of November 8th crossed with one I sent to you on November 9. Undoubtedly you have seen the recent telegram which indicated that I did not relay your latest proposal concerning the wording of the "general rule" on controlled companies. [Comment: The following sentence is underlined by hand]. It seems to me that [blank] proposal relayed in his letter of the 8th to me is better, that is, of course, unless you have some objection to complete deletion. It was my impression that you would have no objection to deletion of the whole Protocol. In any event, I made quite a play at the meeting of November 4 for detailed clarification of the Dutch interests in this particular point which has caused so much trouble. In fact I was a little more than what I called "impatient" in my letter of November 4.

Regarding the [blank] letter, the Foreign Office is unable to understand why we can't find a way to accept their generous offer; however, under the circumstances they prefer to let the Protocol stand as is without a letter. In other words, they accept proposal 1 of the Department's A-317 of June 6, 1955.

Translation of the Protocol is in process. [blank]s confided privately that he is getting help on the translation from [blank] who is sending one of his American assistants this afternoon to help with the wording on the Protocol.

Your prompt replies have certainly been appreciated. In view of [blank]'s forthcoming visit to Washington, I hope you can get us an answer before the 17th as requested in the telegram. Best wishes.

Sincerely yours,

Counselor of Embassy
for Economic Affairs

[Comment: Department of State stamp appears on lower right of page along with file stamp].

[blank] Esquire,
Trade Agreements Division,
SA-7, Room 600,
Department of State,
Washington 25, D. C.

Copy of Letter From James R. Atwood, Deputy Legal Adviser, U.S. Department of State to Lutz Alexander Prager, Esq., Assistant General Counsel, Equal Employment Opportunity Commission Dated September 11, 1979

[SEAL]

DEPARTMENT OF STATE

Washington, D.C. 20520

September 11, 1979

Lutz Alexander Prager, Esq.
Assistant General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Prager:

In response to your letters of March 14 and June 21, the Department has conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty, an issue in *Spiess* v. *C. Itoh & Co.* (Civ. No. 75-H-267, S.D. Tex.) and two other cases more recently decided in the district court in New York (*Avigliano* v. *Sumitomo Shoji America, Inc.*, 77 Civ. 5641 (S.D.N.Y.) and *Linskey* v. *Heidelberg Eastern, Inc.*, 77 Civ. 833 (E.D.N.Y.).

The manner of coverage of subsidiaries is in many instances complex, making it necessary to rely on the intent of the negotiators to fully comprehend certain provisions. On further reflection on the scope of application of the first sentence of Paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover locally-incorporated subsidiaries, and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of

selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII (1) and (4), which respectively provide for national and most-favored-nation treatment of the activities of such subsidiaries. While we do not necessarily agree with all points expressed by the Court in deciding the *Itoh* case on the question of subsidiary coverage, we do concur in general terms with the Court's reasoning, and specifically in the result reached in interpreting the scope of the first sentence of Article VIII, paragraph 1.

Thank you for the opportunity to comment on this issue.

Sincerely yours,

/s/ JAMES R. ATWOOD

James R. Atwood
Deputy Legal Adviser

[Comment: illegible handwriting appears on right margin of letter and around signature block]

Letter of Danish Ministry of Foreign Affairs Dated October 17, 1979 and Translation Thereof Into English

Ministry of Foreign Affairs
Department for Foreign Economic Affairs
Economic Division

12, Stormgade
1470 Cophenhagen K
Phone (01) 12 28 25

A/S Det Østasiatiske Kompagni
(The East Asiatic Company Ltd.)
2, Holbergsgade
1099 Copenhagen K

17th October, 1979

Ref: ØP.1 No. 64.D.25.

Dear Sirs,

In reply to your letter of 9th October, 1979, concerning the interpretation of Articles VII and VIII of the Treaty on Friendship, Commerce and Shipping between Denmark and the United States (1951) we would inform you that an opinion has been given by the Legal Affairs Department of this Ministry. We quote below the full wording of the opinion:

> "Art. VII, paragraph 4, under which nationals and companies of either Party are permitted to engage, within the territories of the other Party; accountants and other technical experts, executive personnel, attorneys, agents and other specialized employees of their choice, regardless of nationality, has the direct aim of ensuring these companies the right to engage own citizens, i.e. foreigners in the eyes of the other Party, to fill the said posts. Accordingly, any assertion of discrimination against American citizens when these seek employment with Danish companies in

the USA is totally unfounded in the wording of the Treaty and its motives.

Further, this Ministry has been given to understand that the provision contained in Art. VII, paragraph 4, governing permission to engage personnel regardless of their nationality should be seen as a general provision which, in the absence of other stipulations, will apply to any company, controlled and managed by the citizens or companies of either Party, in the territories of the other Party, including the companies constituted in pursuance of Art. VIII. This understanding is supported by the construction of Art. VIII, which the Parties to the Treaty have voiced in the "Report on Interpretation", attached to the Treaty, and is also supported by the actual reasons behind the authorization in the same Article to control and manage a company constituted within the other Party's territories.

Otherwise, attention is directed to Art. XXIV of the Treaty, under which any dispute between the Parties as to the interpretation or application of the Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means (paragraph 2). Further, each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the Treaty (paragraph 1). This provision involves that authoritative interpretation of the provisions of the Treaty may be made only by the Parties to the Treaty, jointly, or by a third Party (e.g. court or arbitration), to whom the Parties will have agreed to submit the matter for settlement. Even though, under the transformation system ruling in the USA, the Treaty is directly applicable in the legal system of the Federation or of the individual Federal States and that, accordingly, the provisions of the Treaty may be invoked direct at the national courts, it will clearly appear from the provision of Art. XXIV that an

American court cannot authoritatively interpret the provisions of the Treaty.".

On behalf of the Minister
by authority

(signed) Lars Vissing

I the undersigned, Marie-Louise Brendstrup, Official Interpreter and Translator commissioned by the Royal Danish Ministry of Commerce, Industry and Shipping, hereby certify the foregoing to be a true and faithful translation of the original in the Danish language, produced to me this 29th day of October, 1979, at Copenhagen.

Witness my hand and official seal

[SEAL] /s/ M.-L. BRENDSTRUP

MARIE-LOUISE BRENDSTRUP /s/
sworn translator and interpreter of the English language.

THE MINISTRY OF COMMERCE
Copenhagen, [Illegible] 1979

On behalf of the Minister.
By order.

/s/ TOM LOESCH
Tom Loesch
Ass.

/s/ TOM LOESCH
[Illegible] 1979

/s/ VIBEKE EKBERGER
Vibeke Ekberger

[SEAL]

KINGDOM OF DENMARK
CITY OF COPENHAGEN SS
EMBASSY OF THE UNITED
STATES OF AMERICA

I, JEAN A. LOUIS, Vice Consul of the United States of America at Copenhagen, Denmark, duly commissioned and qualified, do hereby certify that VIBEKE EKBERGER whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was on the 30th day of October 1979, the date thereof an official at the Ministry of Foreign Affairs duly commissioned and qualified, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Embassy at Copenhagen, Denmark this 31st day of October 1979

/s/ JEAN A. LOUIS
Jean A. Louis
American Vice Consul

[Original Letter]

DEPARTEMENTET FOR UDENRIGSOKØNOMI

Den ekonomisk-politiske afdeling

A/S Det Ostasiatiske Kompagni,
Holbergsgade 2,
1o99 Kbh. K.

STORMGADE 12
1470 KOBENHAVN K.
TELEFON. (01) 12 28 25

OP.1 64.D.25.

Date 17. oktober 1979.

I besvarelse af Kompagniets skrivelse af 9. oktober d.a. vedrørende fortolkning af artiklerne VII og VIII i venskabs-, handels- og søfartstraktaten mellem Danmark og De Forenede Stater (1951) kan udenrigsministeriet meddele, at en udtalelse i sagen er indhentet i ministeriets retsafdeling. Udtalelsen følger nedenfor i sin fulde ordlyd:

"Art. VII stk. 4, hvorefter det tillades hver parts statsborgere og selskaber inden for den anden parts områder efter eget valg at beskaeftige revisorer og andre tekniske sagkyndige, overordnede funktionaerer, sagførere, repraesentanter og andet personale med specialuddannelse uden hensyn til de pågaeldendes nationalitet, har direkte til formål at sikre disse selskaber retten til at ansaette egne borgere, dvs. udlaendinge set fra den anden parts side, i de omhandlede stillinger. En pastånd om diskrimination over for amerikanske borgere ved ansaettelse i danske selskaber i USA har derfor ikke noget holdepunkt i traktatens ordlyd eller dens motiver.

Det er endvidere udenrigsministeriets forståelse, at bestemmelsen i artikel VII stk. 4 om adgang til at ansaetta personale uden hensyn til de pågaeldendes nationalitet må ses som en generel bestemmelse, der, hvor andet ikke er fastsat, må gaelde

ethvert selskab, som kontrolleres og ledes af en parts statsborgere eller selskaber, på den anden parts omrade, således også de i medfør af artikel VIII oprettede selskaber. Denne opfattelse bestrykes af den forståelse of artikel VIII, som traktatparterne har givet udtryk for i det "referat vedrørende fortolkning", som er vedhaeftet traktaten, og støttes tillige af reale grunde bag befojelsen i samme artikel til at kontrollere og lede et på den anden parts omrade oprettet selskab.

Opmaerksomheden henledes i øvrigt på traktatens artikel XXIV, hvorefter enhver tvistighed mellem parterne om traktatens fortolkning og anvendelse, der ikke på tilfredsstillende made er blevet afgjort ved diplomatisk forhandling, skal indankes for Den Mellemfolkelige Domstol, med mindre parterne enes om, at afgørelsen skal traeffes ved andre fredelige midler (stk. 2). Endvidere skal hver part velvilligt overveje henvendelser, som den anden part måtte rette angående spø rgsmål om traktatens gennemførelse, og give passende lejlighed til rådslagning vedrørende såddane henvendelser (stk. 1). Denne bestemmelse indebaerer, at en autoritativ fortolkning af traktatens bestemmelser alene kan fastsaettes af traktatparterne i forening eller af en tredje part (f.eks. domstol eller voldgift), til hvem traktatparterne måtte vaere enige om at overlade afgørelsen. Selv om traktaten efter det i USA gaeldende transformerings-system er umiddelbart anvendelig i forbundsstatens eller enkeltstaternes retssystem, og traktatens bestemmelser derfor kan påberåbes direkte ved de nationale domstole, må bestemmelsen i artikel XXIV gøre det klart, at en amerikansk domstol ikke autoritativt kan fortolke traktatens bestemmelser."

P.M.V.
E.B.

/s/ [Illegible]

[SEAL]

/s/ LARS VISSING
Lars Vissing

/s/ VIBEKE EKBERGER
Vibeke Ekberger

of each of the Parties, other than Greenland, the Panama Canal Zone and the Trust Territory of the Pacific Islands.

Article XXIV.

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.

Article XXV.

The present Treaty shall replace the convention of friendship, commerce and navigation signed April 26, 1826,[1] except Articles 8, 9, and 10 thereof, which shall remain in force until replaced by a consular convention between the two Parties or until one year after either Party shall have given to the other Party written notice of termination of the aforesaid Articles.

Article XXVI.

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Washington as soon as possible.

1 TS 65; 8 Stat. 340.

[Danish translation of above, p. 935]

overhøjhed med undtagelse af Grønland, Panamakanalzouen og formynderskabsområdet Stillehavsøerne.

Artikel XXIV.

1. Hver part vil velvillig overveje henvendelser, som den anden part måtte rette ungående spørgsmål om naervaerende traktats genneinførelse, og give passende lejlighed til radslagning vedrørende sådanne henvendelser.

2. Enhver tvistighed mellem parterne om naervaerende traktats fortolkning og anvendelse, der ikke på tilfredsstillende måde er blevet afgjort ved diplomatisk forhandling, skal indankes for Den Mellemfolkelige Domstol, medmindre parterne enes om, at afgørelse skal traeffes ved andre fredelige midler.

Artikel XXV.

Naervaerende traktat traeder i stedet for den den 26. april 1826 undertegnede venskabs-, handels-og skibsfartskonvention, dog at sidstnaevntes artikler 8, 9 og 10 skal forblive i kraft, indtil de måtte blive erstattet af en konsularoverenskomst mellem de to parter, eller indtil der er forløbet eet år efter, at en af parterne ved skriftligt varsel til den anden part måtte have opsagt de pågaeldende artikler.

Artikel XXVI.

1. Naervaerende traktat skal ratificeres og ratifikationsinstrumenterne snarest mulig udveksles i Washington.

Plaintiffs' Reply to Counterclaims Dated March 6, 1980

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5641 (CHT)

LISA M. AVIGLIANO, et al.,

Plaintiffs,

—against—

SUMITOMO SHOJI AMERICA, INC.,

Defendant.

REPLY TO COUNTERCLAIMS

Plaintiffs, by their attorneys Eisner, Levy, Steel & Bellman, P.C., for their reply to defendant's counterclaims, allege as follows:

1. Plaintiffs admit that defendant claims to invoke jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343, and the doctrine of ancillary jurisdiction, but deny that jurisdiction is properly invoked.

2. Deny paragraph 19 of the amended counterclaims.

3. Deny all of paragraph 20 of the amended counterclaims except with regard to that aspect of the paragraph that alleges that the Equal Employment Opportunity Commission violated its own rules and Sumitomo was required to spend substantial amounts of time and money responding thereto. As to these allegations, plaintiffs lack information sufficient to form a belief.

4. Plaintiffs lack information sufficient to form a belief as to paragraph 21 of the amended counterclaim.

5. Deny paragraphs 22, 23, 24, 25 and 26 of the alleged counterclaim.

6. Plaintiffs interpose no reply to paragraphs 27, 28 and 29 of the amended counterclaim as the court below ruled that they did not state a cause of action.

7. In response to paragraph 30 of the amended counterclaim, plaintiffs incorporate by reference their prior answers to the paragraphs incorporated.

8. Deny paragraphs 31, 32 and 33 of the amended counterclaim.

9. As to paragraph 34 of the amended counterclaim, plaintiffs incorporate by reference the replies to the paragraphs incorporated in this paragraph.

10. Deny paragraphs 35, 36 and 37 of the amended counterclaim.

11. As to paragraph 38 of the amended counterclaim, plaintiffs incorporate by reference the replies to the paragraphs incorporated in this paragraph.

12. Deny paragraphs 39, 40 and 41 of the amended counterclaim.

WHEREFORE, plaintiffs pray judgment as follows:

(a) That the counterclaims herein be dismissed with prejudice;

(b) That plaintiffs be awarded the costs of defending these counterclaims, including reasonable attorneys' fees; and

(c) That plaintiffs be awarded such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
March 6, 1980

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs
351 Broadway
New York, New York 10013
(212) 966-9620

By /s/ LEWIS M. STEEL
Lewis M. Steel

TO: CLERK
United States District Court

WENDER, MURASE & WHITE
Attorneys for Defendant

Order of the Supreme Court Granting Petition for Writ of Certiorari (No. 80-2070)

SUPREME COURT OF THE UNITED STATES

No. 80-2070

SUMITOMO SHOJI AMERICA, INC.,

Petitioner.

v.

LISA M. AVIGLIANO, et al.

ORDER ALLOWING CERTIORARI—Filed November 2, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with case No. 81-24, *Lisa M. Avigliano, et al.* v. *Sumitomo Shoji America, Inc.*, and a total of one hour is allotted for oral argument. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Order of the Supreme Court Granting Petition for Writ of Certiorari (No. 81-24)

SUPREME COURT OF THE UNITED STATES

No. 81-24

LISA M. AVIGLIANO, et al.,

Petitioners.

v.

SUMITOMO SHOJI AMERICA, INC.

ORDER ALLOWING CERTIORARI—Filed November 2, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is consolidated with case No. 80-2070, *Sumitomo Shoji America, Inc.*, v. *Lisa M. Avigliano, et al.*, and a total of one hour is allotted for oral argument. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Department of State Document
Dated September 9, 1980

The Government of the United States refers to the Danish Government's note of March 17, 1980, concerning the case *Linskey* v. *Heidelberg Eastern, Inc.*, 470 F. Supp. 1191 (E.D.N.Y. 1979), *Leave to appeal denied,* Civ. 79-8475 (2d Cir. Jan. 23, 1980); and its relationship to the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark, signed on October 1, 1951.

Issues similar to those presented in the above-mentioned note have arisen under similar provisions of United States treaties with other countries. They have been extensively considered by the Department of State and by United States courts (which must construe and apply such treaties as an element of United States domestic law). After extensive review of the matter, including study of the negotiating records of the several United States bilateral treaties of friendship, commerce and navigation containing provisions similar to Article VII(4) of the U.S.-Danish treaty, the Department of State has concluded that it was not the intent of the negotiators that Article VII of the Treaty cover locally-incorporated subsidiaries of United States and Danish corporations. To the contrary, Article XXII(3) of the Treaty specifically provides that:

> "Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party."

In this Government's opinion, Article VII is therefore inapplicable to Heidelberg Eastern, Inc. and East Asiatic Company, Inc., which are incorporated under the laws of New York. Whatever rights East Asiatic Company, Ltd., a Danish com-

pany within the meaning of Article VII, may enjoy under that Article do not extend to its subsidiaries.

Article VIII(1), which authorizes nationals and companies of one Party to constitute certain local companies in the territory of the other Party and to control and manage such enterprises, does not compel the contrary conclusion. Article VIII(2) clearly provides that companies constituted under the laws of one Party and controlled by companies of the other Party shall be entitled only to national treatment. National treatment does not entail any exemption from host country laws applicable to host country companies.

In addition, even if Article VII(4) were applicable to subsidiaries incorporated in the United States, that Article would not preclude absolutely the application of statutes barring employment discrimination. The language of that Article authorizes certain employment decisions without reference to nationality, but it does not extend to a blanket exemption from all legislation concerning discrimination in employment.

Regarding the general issue of the applicability of United States employment discrimination laws to companies (and their subsidiaries) of countries with which the United States has commercial treaties, we enclose two other recent United States court cases involving interpretation of similar provisions in the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, *Spiess* v. *C. Itoh & Co.*, 469 F.Supp. 1 (S.D. Tex., 1979), *appeal docketed,* No. 79-2382 (5th Cir. June 11 1979); and *Avigliano* v. *Sumitomo Soji* [sic] *America, Inc.*, 473 F.Supp. 506 (S.D.N.Y. 1979), *appeal docketed,* No. 80-7418 (2nd Cir. May 21, 1980). Both these cases were decided along the lines of the reasoning set forth above.

Enclosures:
As described.

Drafted: L/EB:JBello-5/8/80:L/EUR:JRCrook-6/17/80:
L/EUR:HCollums-8/29/80
Clearances: EEOC/GC:LPrager
EUR/NE:WDameron
EB/IFD/OIA:RRoberts
S/S-S:EDenham

[Comment: illegible handwriting to the right of names]

Department of State
Washington,
September 9, 1980

Office-Supreme Court, U.S.
FILED
AUG 3 1981
ALEXANDER L. STEVAS,
CLERK

80-2070

No. 2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

v.

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER AND ELIZABETH WONG,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEWIS M. STEEL
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Attorney for Respondents

STEEL & BELLMAN, P.C.
Of Counsel

(11162)

No. 2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

v.

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER AND ELIZABETH WONG,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents in this proceeding have filed a cross-petition (No. 81-24) in which they have asserted that the decision of the United States Court of Appeals in this matter has decided important questions of Federal law, which have not, but should be, settled by this Court. Respondents adhere to this view with regard to this petition.

Respondents' only reason for opposing the granting of this writ is based on the fact that the issue presented for review in

the petition, if reviewed in isolation from the issues raised in the cross-petition, may not give this Court adequate scope to resolve the Treaty and Title VII questions raised by this litigation. The issue raised by this petition assumes, consistent with the Second Circuit opinion, that the Treaty of Friendship, Commerce and Navigation ("FCN") makes no distinction between foreign corporations incorporated in a country having an FCN with the United States and American domestic subsidiaries of such corporations. Thus, the granting of this writ without the granting of the writ in the cross-petition could leave unresolved the narrower question as to whether an American domestic corporation which is a subsidiary of a foreign corporation incorporated in a country having an FCN with the United States may invoke the Treaty as a defense to a claim that it is engaging in employment discrimination in violation of Title VII. Respondents point out that the United States Department of State takes the position that the FCN in question does not give such an American domestic corporation the right to invoke the Treaty as a defense to a Title VII claim. 74 Am. J. Int'l L. at 158-9 (1980).

For the above reasons, the petition should not be granted unless this Court determines to grant the cross-petition.

Respectfully submitted,

Lewis M. Steel
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Attorney for Respondents

Steel & Bellman, P.C.
Of Counsel

Office-Supreme Court, U.S.
FILED
AUG 23 1981
ALEXANDER L. STEVAS,

No. 80-2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SUMITOMO SHOJI AMERICA, INC.,

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—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Attorneys for Petitioner

Of Counsel:

EDWARD H. MARTIN
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WENDER, MURASE & WHITE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2070

SUMITOMO SHOJI AMERICA, INC.,

Petitioner,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In its petition for a writ of certiorari filed June 6, 1981 (Docket No. 80-2070), petitioner Sumitomo Shoji America, Inc. ("Sumitomo") presented as one of the grounds for granting the petition the existence of a conflict between the decision below of the United States Court of Appeals for the Second Circuit, reported at 638 F.2d 552 (App. A to Petition, 1a-15a), and an April 24, 1981 decision on the same matter by the majority of a panel of the United States Court of Appeals for the Fifth Circuit in *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353 (5th Cir. 1981) (App. F to Petition, 63a-97a).

Respondents filed a cross-petition with this Court on July 1, 1981 (Docket No. 81-24), and also filed a response to Sumi-

tomo's petition on August 3, 1981. In their cross-petition, respondents cited with approval the dissenting opinion in *Spiess, supra.*

By order dated August 7, 1981, the Fifth Circuit granted a petition by the plaintiffs in *Spiess* for rehearing en banc. A copy of the August 7, 1981 order of the Fifth Circuit is appended hereto. The effect of that order is to vacate the Fifth Circuit panel's decision of April 24, 1981 (5th Cir. R. 17). The Fifth Circuit's August 7, 1981 order therefore technically eliminates, at least for the time being, the conflict between circuits.

One can merely speculate as to whether the rehearing en banc by the Fifth Circuit in *Spiess* will result in a decision consistent with the Second Circuit's decision below. If the Fifth Circuit issues an en banc decision in *Spiess* which remains in conflict with the Second Circuit's decision below, the confusion which these cases have already engendered in respect of the relationship of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 (1953) ("the Treaty") to Title VII of the Civil Rights Act, as amended, 42 U.S.C. §§ 2000e *et seq.*, will only be compounded.*

Even absent a conflict between circuits, however, there are other good reasons for this Court to grant Sumitomo's petition. Sumitomo has raised an important question of the relationship between domestic civil rights legislation and U.S. international obligations under the Treaty and similar friend-

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* For example, if the Fifth Circuit's en banc panel adopts the reasoning of Judge Reavley's dissenting opinion to the April 24, 1981 decision, a conflict between circuits will still exist. While the majority of the Fifth Circuit panel disagreed with the limits the Second Circuit placed on the extent of the protection granted to a U.S. subsidiary of a Japanese company by the employment right provision of Article VIII(1) of the Treaty, Judge Reavley concluded that a U.S. subsidiary of a Japanese company does not even have capacity to invoke that employment right provision, a view which the Second Circuit unanimously rejected.

ship, commerce and navigation treaties whose common purpose is to promote and protect private international investment and trade. This question should be resolved so as to clarify the rights of foreign investors under such treaties to control and manage, with key personnel of their choice, the enterprises they establish or acquire in the United States, and also to define for U.S. investors the basis for asserting their reciprocal rights abroad.

Sumitomo renews its prayer that this Court grant the petition for a writ of certiorari to review the decision below of the United States Court of Appeals for the Second Circuit, and resolve the question of whether the right granted by Article VIII(1) of the Treaty to fill management level positions with Japanese nationals is limited by Title VII. If this Court views the Fifth Circuit's order in *Spiess* granting rehearing en banc as rendering it inappropriate to grant Sumitomo's petition, Sumitomo respectfully requests that this Court defer its consideration of the petition and the cross-petition, pending issuance of the Fifth Circuit's en banc decision.

Respectfully submitted,

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(212) 832-3333

Attorneys for Petitioner

Of Counsel:

EDWARD H. MARTIN
CARL J. GREEN
WENDER, MURASE & WHITE

August 25, 1981

[COPY OF ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AUGUST 7, 1981]

[STAMP]
U.S. Court of Appeals
Filed
August 7, 1981
Gilbert F. Ganucheau
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A
No. 79-2382

MICHAEL E. SPIESS, JACK K. HARDY
and BENJAMIN F. ROUNTREE,
Plaintiffs-Appellees,

versus

C. ITOH & COMPANY (AMERICA) INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion *April 24*, 198*1*, 5 Cir., 198____, ____ F.2d ____).

(August 7, 1981)

Before: BROWN, AINSWORTH, CHARLES CLARK, GEE, RUBIN, GARZA, REAVLEY, POLITZ, RANDALL, TATE, SAM D. JOHNSON and WILLIAMS, Circuit Judges.

BY THE COURT:

A member of this Administrative Unit of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Administrative Unit in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Administrative Unit of the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

No. 80-2070
No. 81-24

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner and Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents and Cross-Petitioners,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER AND CROSS-RESPONDENT

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Attorneys for Petitioner and Cross-Respondent

Of Counsel:

EDWARD H. MARTIN
CARL J. GREEN
WENDER, MURASE & WHITE

ABRAM CHAYES
3 Hubbard Park
Cambridge, Massachusetts 02138

January 18, 1982

QUESTIONS PRESENTED

Question Presented by the Petitioner:

Is the right of Japanese companies to control and manage their U.S. investments by engaging "executive personnel . . . of their choice," as provided by the Treaty of Friendship, Commerce and Navigation between the United States and Japan, limited by Title VII of the Civil Rights Act of 1964?

Questions Presented by the Cross-Petitioners:

Whether Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, which permits nationals and companies of either party to engage executive personnel of their own choice, is applicable to a domestic corporation which is a wholly owned subsidiary of a Japanese corporation.

Whether the "bona fide occupational qualification" exception to Title VII (42 U.S.C. § 2000e-2(e)) should be relaxed when applied to an American subsidiary of a Japanese corporation in deference to the 1953 Treaty of Friendship, Commerce and Navigation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2070
No. 81-24

SUMITOMO SHOJI AMERICA, INC.,

Petitioner and Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents and Cross-Petitioners,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER AND CROSS-RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated January 9, 1981 (Pet. App. 1a) is reported at 638 F.2d 552.[1] The opinion of the United States District Court for the Southern District of New York dated

1 Citations to the Appendices to the Petition for a Writ of Certiorari are indicated as follows: Pet. App. __ a. Citations to the Joint Appendix are indicated as follows: App. __ a.

June 5, 1979 (Pet. App. 19a) is reported at 473 F. Supp. 506. Certification for an immediate appeal pursuant to 28 U.S.C. § 1292(b) was granted in an opinion of the District Court dated August 9, 1979 (Pet. App. 39a) unofficially reported at 20 Empl. Prac. Dec. (CCH) ¶ 30,205 and 20 Fair Empl. Prac. (BNA) 72. The opinion of the District Court on reargument dated November 29, 1979 (Pet. App. 45a) is unofficially reported at 21 Empl. Prac. Dec. (CCH) ¶ 30,501 and 21 Fair Empl. Prac. (BNA) 580.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit (Pet. App. 17a) was entered on January 9, 1981. On March 31, 1981, Justice Marshall signed an order extending the time for filing a petition for a writ of certiorari to and including June 6, 1981. Sumitomo filed its petition for a writ of certiorari on June 6, 1981 (No. 80-2070), and a cross-petition (No. 81-24) was filed on July 1, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). On November 2, 1981, the Court granted the petitions and consolidated the cases for review. ____ U.S. ____, 50 U.S.L.W. 3351.

TREATY, STATUTES AND REGULATION INVOLVED

1. Article VIII of the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953) (the "Treaty"), provides:

> (1) Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical ex-

perts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

(2) Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party.

(3) Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities within the territories of the other Party, and shall be accorded the right to form associations for that purpose under the laws of such other Party.

2. Article I of the Treaty provides:

(1) Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens..

(2) Nationals of either Party, within the territories of the other Party, shall be permitted: (a) to travel therein freely, and to reside at places of their choice; (b) to enjoy liberty of conscience; (c) to hold both private and public religious services; (d) to gather and to transmit material for dissemination to the public abroad; and (e) to communicate with other persons inside and outside such territories by mail, telegraph and other means open to general public use.

(3) The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and protect the public health, morals and safety.

3. Article VII(1) of the Treaty provides:

Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

4. Article XXII(3) of the Treaty provides:

> As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

5. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e-(2)(a), provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

6. Section 703(e) of Title VII, 42 U.S.C. § 2000e-(2)(e), provides in relevant part:

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably neces-

sary to the normal operation of that particular business or enterprise . . . .

7. Section 101(a) of the Immigration and Nationality Act of 1952, as amended (the "INA"), 8 U.S.C. § 1101(a), provides in relevant part:

> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> . . .
>
> (E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . .

8. 22 C.F.R. § 41.40(a)(1981) provides:

> An alien shall be classifiable as a nonimmigrant treaty trader if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(E)(i) of the Act and that: (1) He intends to depart from the United States upon the termination of his status; and (2) if he is employed by a foreign person or organization having the nationality of the treaty country which is engaged in substantial trade as contemplated by section 101(a)(15)(E)(i), he will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

STATEMENT OF THE CASE

This case presents the question whether the right of Japanese foreign investors to control and manage their U.S. investments by employing Japanese nationals in managerial positions pursuant to the 1953 Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (the Treaty or the Japanese Treaty), is limited by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1978) (Title VII).

Petitioner, Sumitomo Shoji America, Inc. (Sumitomo) is a New York corporation and a wholly-owned subsidiary of Sumitomo Shoji Kabushiki Kaisha, a Japanese general trading company or *sogo shosha.*[2] As their name implies, general trading companies are service sector business firms that handle a wide range of products and discharge a variety of trade-related functions for their customers. Their activities include purchasing, selling and marketing, as well as the provision of transportation, warehousing, insurance and financing services. Large *sogo shosha*, like Sumitomo Shoji Kabushiki Kaisha, maintain offices around the world. Through their knowledge of products and markets, they seek to identify trade and investment opportunities for their customers, to develop new sources of supply, and to organize new industrial facilities. Together these companies handle more than half of Japan's imports and exports. *See generally* Krause & Sekiguchi, *Japan and the World Economy* in *Asia's New Giant: How the Japanese Economy Works* 389-397 (H. Patrick & H. Rosovsky eds. 1976) (hereafter *Japan and the World Economy*); Japan External Trade Organization, *The Role of Trading Companies in International Commerce* 1, 6 (1980); Affidavit of J. Portis

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2 The affiliates of petitioner are listed in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 4 n.1.

Hicks of May 18, 1978, in support of Sumitomo's motion to dismiss at ¶ 8, App. 72a, 74a (hereafter Hicks Affidavit) and authorities cited therein.

Because of the variety and complexity of the transactions in which *sogo shosha* engage, their managerial employees must have extensive training in and knowledge of international trade and investment and must be familiar with the Japanese market, culture, business practices and, of course, language. Therefore these firms typically devote great effort to the recruitment and training of their future managerial employees. A. Young, *The Sogo Shosha: Japan's Multinational Trading Companies,* 68 (1979). Candidates are selected through an intense competition among graduating university students, and successful applicants are trained by means of a rigorous apprenticeship involving a lengthy rotation throughout the various divisions of the business and among its branch offices in Japan. "It may well be a number of years before the new employee begins to make a significant contribution to the firm". *Japan and the World Economy, supra,* at 389. The training of executives involves a heavy investment on the part of the firm and executive employees typically remain with the firm throughout their working lives. *See generally* Y. Tsurumi & R. Tsurumi, *Sogoshosha* 30-34 (1980). Executive employment in *sogo shosha* is in every sense a career service.

In accordance with the general practice of *sogo shosha,* Sumitomo's Japanese parent sends members of its organization to fill key positions in Sumitomo. Hicks Affidavit, *supra,* ¶ 6, App. at 74a. These personnel are admitted to the United States as "treaty traders" under nonimmigrant E-1 visas, *id.,* which are available only to nationals of countries with which the United States has a friendship, commerce and navigation (FCN) treaty in force. An E-1 visa allows the alien to enter and stay in the United States, "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . ." Immigration and Nationality Act of 1952, as amended (INA), § 101(a)(15)(E)(i), 8 U.S.C.

§ 1101(a)(15)(E)(i). Under regulations issued by the Department of State, an E-1 visa can be issued only to a person who will be engaged in an executive or supervisory position or who has special qualifications making his or her services essential to a company "having the nationality of the treaty country . . . ." [3] The alien must depart the United States upon termination of treaty trader status. 22 C.F.R. § 41.40(a).

Plaintiffs in this litigation are, with one exception, "female citizens of the United States." Complaint, ¶ 2, App. 6a, 6a-7a. The remaining plaintiff, Reiko Turner, is female and a "citizen of Japan." Complaint, ¶ 3, App. at 7a. All plaintiffs are past or present secretarial employees of Sumitomo (Complaint, ¶¶ 4-6, App. at 7a) who allege that Sumitomo discriminated against them by restricting them to clerical jobs and by not promoting them to "executive, managerial and/or sales positions" because they are women and (with the exception of Reiko Turner) because of their U.S. "nationality." Complaint, ¶¶ 12, 13; at 9a.[4] Plaintiffs seek an unspecified amount of damages, as well as injunctive relief directing Sumitomo to promote plaintiffs to such executive, managerial and sales positions and enjoining Sumitomo from discriminating on the basis of sex and nationality in the hiring of new employees. Complaint, demand for relief, App. at 10a-11a.

No claim is made by plaintiffs that the Japanese nationals who hold managerial positions in Sumitomo are not qualified

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3 To have "the nationality of the treaty country" the employer must be owned more than 50% by foreign nationals or companies having the citizenship of the foreign treaty partner. *See* 9 Foreign Affairs Manual, Part II, § 41.40 Notes 8 & 16; 22 C.F.R. § 41.40(a). See discussion below at pp. 39-40.

4 Plaintiffs also asserted two other claims in the District Court not relevant to the questions presented here for review: (1) a claim pursuant to the Thirteenth Amendment, which they abandoned, and (2) a claim pursuant to the Civil Rights Act of 1866, 42 U.S.C. § 1981, which was dismissed by the District Court for failure to state a claim upon which relief can be granted. 473 F. Supp. 506, at 508 n.1 & 514; Pet. App. 19a, 20a n.1, 30a-32a.

for those positions or that they were not properly admitted as treaty traders under E-1 visas permitting them to enter the United States for the purpose of employment in such positions.

Sumitomo denied plaintiffs' claims of discrimination and asserted as an affirmative defense that its employment of Japanese nationals in key positions is authorized by Article VIII(1) of the Treaty permitting Japanese investors "to engage . . . executive personnel . . . and other specialists of their choice," 4 U.S.T. at 2070, and related statutes and regulations. First Amended Answer of Sumitomo, ¶ 13, App. 80a, 82a. On this basis, Sumitomo moved to dismiss the complaint for failure to state a claim upon which relief can be granted.

On two separate occasions during the pendency of Sumitomo's motion to dismiss, different Deputy Legal Advisers of the State Department issued letters to the Equal Employment Opportunity Commission (EEOC) embodying contradictory constructions of the treaty. On two other occasions, the Office of the Legal Adviser of the State Department released documents from its treaty negotiating files.[5] These letters and documents were submitted to the District Court by the parties and by the EEOC, which appeared in the proceedings below as *amicus curiae.*

Ultimately, the District Court denied Sumitomo's motion to dismiss, holding that Sumitomo is, under a definition set out in in Article XXII(3) of the Treaty, a "company of the United States" and as such not entitled to invoke the employment

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5 The documents and letters issued by the State Department were: Letter from Lee R. Marks, Deputy Legal Adviser, to Abner W. Sibal, General Counsel, EEOC (Oct. 17, 1978), App. 94a, *reprinted in* 73 Am. J. Int'l L. 281 (1979); documents released under cover of a letter of a State Department Attorney Adviser, August 15, 1979, App. 102a-306a; letter from James R. Atwood, Deputy Legal Adviser, to Lutz A. Prager, Assistant General Counsel, EEOC (Sept. 11, 1979), App. 307a, *reprinted in* 74 Am. J. Int'l L. 158 (1980); and documents released under cover of letter of a State Department Attorney Adviser dated October 29, 1979. The documents released on October 29, 1979 are not part of the record herein.

right granted by Article VIII(1) of the Treaty. 473 F. Supp. at 512-513, Pet. App. at 24a. The substance of this holding was adhered to on reargument. 21 Empl. Prac. Dec. (CCH) ¶ 30,501, Pet. App. at 59a-60a.

On appeal, the United States Court of Appeals for the Second Circuit affirmed, but on different grounds. Although the Second Circuit acknowledged that Sumitomo is "entitled to invoke the employment provisions of the Treaty . . . ," 638 F.2d 552, 554, Pet. App. at 5a, it held nevertheless that the complaint stated a cause of action, reasoning that the Treaty provision authorizing Japanese investors to engage executive personnel and other specialists "of their choice" was limited by the provisions of Title VII. The Court observed that at the trial on remand the bona fide occupational qualification (BFOQ) exception to Title VII

> must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company doing business in the United States, including such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business.

638 F.2d at 558-59, Pet. App. at 14a-15a. The Court below did not directly address the question whether discrimination in employment based on nationality violates Title VII.

SUMMARY OF ARGUMENT

Sumitomo's practice of preferring Japanese nationals for managerial positions, the practice attacked by the complaint, is not prohibited by Title VII. In *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), this Court held that hiring on the basis of nationality or citizenship is not unlawful under Title VII. *Accord*, *Morton v. Mancari*, 417 U.S. 535 (1974). These holdings should dispose of this case. The Second Circuit, however, did not apply them. Instead, it assimilated Sumitomo's *nationality*-based employment preference to discrimination on the basis of *national origin*, a characterization which is both factually incorrect and legally at odds with the cited rulings of this Court.

The decision of the Second Circuit should be reversed for other reasons. The express language of the Treaty, reinforced by its legislative and negotiating history, clearly grants the employment right claimed by Sumitomo. An explicit objective of the U.S. negotiators of this and at least a dozen other postwar FCN treaties was to secure for U.S. investors abroad the right to employ U.S. citizens in managerial positions. Since the structure of the treaty is reciprocal, it follows that a parallel right is granted to Japanese investors in the United States. Well-established rules of statutory construction prescribe that an Act of Congress not be construed to abrogate or modify solemn treaty obligations in the absence of an express indication of Congressional intent to do so. *E.g.*, *Cook v. United States*, 288 U.S. 102 (1933); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). There is neither statutory language nor legislative history to support a construction of Title VII restrictive of the Treaty rights invoked by Sumitomo. Moreover, such a construction would create duplication, confusion and conflict between the administration of Title VII by the EEOC, on the one hand, and administration of the INA by the State Department and the Immigration and Naturalization

Service (INS), on the other. All these considerations were disregarded by the Court below.

Cross-petitioners argue that because Sumitomo is a U.S. subsidiary of a Japanese corporation, it cannot invoke the Article VIII(1) employment provision. This argument is belied by the language of the Treaty and by its negotiating and legislative history, which demonstrate a purpose to promote and protect U.S.-Japanese private direct investments and specifically to assure to foreign investors the right to manage and control their investments whatever the legal form. Recognizing this purpose, both the Court below and the United States Court of Appeals for the Fifth Circuit in *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353, (5th Cir. 1981), Pet. App. 63a, *rehearing en banc granted*, 654 F.2d 302 (Aug. 7, 1981), *order granting rehearing en banc vacated*, No. 79-2382 (Dec. 9, 1981), held that the Treaty's employment right may be invoked by a U.S. subsidiary of a Japanese investor.

The Second Circuit's instruction as to the liberal BFOQ exception to be applied on remand was necessarily entailed by its holding that Title VII is applicable to employment practices authorized by the Treaty—if any significance is to be accorded the Treaty right. But this consequence is an independent ground for refusing to apply Title VII here.

For the above reasons, the complaint in this case should be dismissed for failure to state a claim upon which relief may be granted.

ARGUMENT

I.

SUMITOMO'S PREFERENTIAL EMPLOYMENT OF JAPANESE NATIONALS IN EXECUTIVE, SUPERVISORY AND SPECIALIST POSITIONS IS NOT AN UNLAWFUL EMPLOYMENT PRACTICE UNDER TITLE VII.

The Treaty expressly provides that "[n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party. . . . executive personnel . . . and other specialists of their choice." Treaty, Article VIII(1). Sumitomo has availed itself of this right and employed in executive, supervisory and specialist positions nonimmigrant Japanese nationals assigned to it by its parent company in Japan. It is this employment practice that plaintiffs attack. Thus, the central question presented by Sumitomo's motion to dismiss is whether a practice of preferring Japanese nationals for these key positions constitutes an "unlawful employment practice" for purposes of Title VII. Sumitomo contends that it does not because Title VII does not interdict employment practices based on nationality.

Sumitomo makes no claim that it is "exempt" from Title VII or that it is not an employer within the meaning of the Act. It concedes, for example, that it could not hire male U.S. citizens to the exclusion of female U.S. citizens. Similarly, it could not discriminate on the basis of national origin. See discussion at pp. 16-17, *infra*. The issue therefore is not whether Title VII "applies" to Sumitomo, or to Japanese companies in general, but whether the employment practice under attack violates Title VII.

Title VII is not a general equal protection in employment statute. *See Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980). To state a Title VII claim, plaintiff must allege an employment practice "based on a discrimina-

tory criterion illegal under the Act." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575 (1978); *see also*, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). As this Court said in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 95 (1973), the initial inquiry in a Title VII suit is "what kinds of discrimination the Act makes illegal." Sections 703 and 704 of Title VII, 42 U.S.C. §§ 2000e-2 & 2000e-3, define an "unlawful employment practice" as one that discriminates on the basis of "race, color, religion, sex, or national origin." It is only when an employer treats some people less favorably than others because of one of these five criteria that Title VII is violated. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *accord, Furnco Construction Corp. v. Waters, supra*, 438 U.S. at 577.

In this case, the challenged criterion is Japanese nationality. But in *Espinoza, supra*, this Court squarely held that

> nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage.

414 U.S. at 95. The logic underlying the Court's holding is equally applicable whether the alleged discrimination favors United States citizens, as in *Espinoza*, or favors individuals having other nationalities. *See Dowling v. United States*, 476 F. Supp. 1018, 1022 (D. Mass 1979) (complaint by U.S. citizen that the National Hockey League and the World Hockey Association discriminated against him on the basis of his U.S. citizenship by hiring only Canadian referees failed to state a claim under Title VII); *Novak v. World Bank*, 20 Empl. Prac. Dec. (CCH) ¶ 30,021 (D.D.C 1979) (complaint by a U.S. citizen alleging that the hiring practices of the World Bank discriminated against him on the basis of his U.S. citizenship failed to state a claim under Title VII); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan. L. Rev. 947, 958 (1979).

The principle of *Espinoza* was applied again in *Morton v. Mancari*, 417 U.S. 535 (1974), where the Court held that a preferential employment practice favoring members of federally recognized Indian tribes did not violate Title VII. The preference for Indians was "political rather than racial in nature." 417 U.S. at 553 n. 24. It was available for Indians not because of their racial or ethnic heritage, and not because of their identification with a racial or ethnic group, but rather because they were members of certain sovereign political bodies.

The Second Circuit treated the employment practices here in issue as "national origin" discrimination. *See* 638 F.2d at 559, Pet. App. at 14a (quoting only national origin language of statutory BFOQ exception). But such a characterization is both legally and factually incorrect.

As a legal matter, the statutory phrase "national origin" does not embrace citizenship. After reviewing Title VII's legislative history, this Court decided in *Espinoza* that the phrase "national origin" refers to "the country where a person was born, or, more broadly, the country from which his or her ancestors came," in contrast to the country of which he or she is a citizen or national. 414 U.S. at 88.

The distinction between nationality and national origin has consistently been recognized by the federal government. Indeed, as this Court said in *Espinoza*, to hold that national origin embraces citizenship or alienage would require the Court to conclude that "Congress itself has repeatedly flouted its own declaration of policy." 414 U.S. at 90. This is because Congress itself has passed laws discriminating against aliens, *see, e.g.*, 31 U.S.C. § 699b. Although in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the Court struck down practices of various government agencies barring aliens from government employment, it recognized that such practices could be mandated by express congressional or presidential action. Thereafter the President did prohibit employment of aliens in federal government positions. Exec. Order No. 11,935, 41 Fed. Reg. 37,301

(1976), codified at 5 C.F.R. § 7.4. In contrast, other Executive Orders prohibit national origin discrimination in federal government employment. *See* Exec. Order No. 11,478 (1969), 3 C.F.R. 803 (1966-1970 Compilation), as amended by Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1978). Similarly, an Act of Congress extended Title VII to apply to government employment. Act of March 24, 1972, Pub. L. 92-261, § 11, 86 Stat. 103. The EEOC has also recognized that discrimination on the basis of citizenship, without more, is not national origin discrimination under Title VII. *See, e.g.*, EEOC Dec. No. 76-141, Empl. Prac. Guide (CCH) ¶ 6703 (1976); EEOC Dec. No. 76-133, Empl. Prac. Guide (CCH) ¶ 6695 (1976); EEOC Dec. No. 76-111, Empl. Prac. Guide (CCH) ¶ 6677 (1976); *see also* Guidelines on Discrimination because of National Origin, 29 C.F.R. §§ 1606.1, 1606.5 (1981).

As a factual matter, the basis of the employment preference under attack in this case is Japanese nationality, not place of birth or ancestry. It prefers Japanese nationals, as opposed to the nationals, citizens and subjects of all other countries. This result occurs by operation of law, since only Japanese nationals can acquire treaty trader visa status for employment in Japanese owned firms. INA § 101(a)(15)(E), 8 U.S.C. § 1101(a)(15)(E); 22 C.F.R. § 41.40(a); 9 Foreign Affairs Manual, Part II, § 41.40 Note 16. The preference for Japanese nationals in managerial positions is not a practice directed against any particular nationality, and it has nothing to do with anyone's national origin. The group not preferred consists of persons of every other nationality, U.S. or otherwise, and persons of every conceivable national origin, including those who by birth or ancestral background might be regarded by some, or consider themselves "Japanese," but who are not Japanese nationals.

Nor does the complaint state a claim of employment discrimination on the basis of sex. Sumitomo's criterion of preference—derived directly from its treaty rights as imple-

mented by the INA—is Japanese nationality, not sex.[6] Moreover, plaintiffs cannot, on the facts alleged, construct a so-called "sex-plus" claim. Such claims have been recognized only where there was an inherent linkage between the criterion used by the employer—*e.g.*, pregnancy—and gender. *E.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971). In those cases the facially neutral criterion served as a surrogate for gender. In contrast, courts have rejected "sex plus" claims when the employer's classification is based on citizenship because there is no correlation between nationality and gender. *Spirides v. Reinhardt*, 22 Empl. Prac. Dec. (CCH) ¶ 30,740 (D.D.C. 1980), *aff'd w/o opinion*, 656 F.2d 900 (D.C. Cir. 1981); *Michalas v. Reinhardt*, No. 78-0920, slip op. at 4 (D.D.C. May 29, 1979), *aff'd w/o opinion*, No. 79-2007 (D.C. Cir. June 21, 1980).

The decisions of this Court in *Espinoza* and *Morton*, *supra*, are dispositive of this case, in which the plaintiffs attack an employment preference based on nationality, not "race, color, religion, sex or national origin." In accordance with those decisions, the complaint herein should be dismissed for failure to state a claim upon which relief may be granted.

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6 Sumitomo acknowledges that the sex discrimination claim of Reiko Turner, a Japanese national, is not inextricably linked to the claim of hiring practices based on nationality. Accordingly, in the proceedings below, Sumitomo conceded that her individual sex discrimination claim survives the motion to dismiss insofar as Turner alleges that Sumitomo has discriminated against her as a woman in its selection of Japanese nationals for managerial positions.

II.

THE TREATY ESTABLISHES A RIGHT TO CONTROL AND MANAGE ENTERPRISES IN THE HOST COUNTRY BY EMPLOYMENT OF HOME COUNTRY NATIONALS IN MANAGERIAL POSITIONS.

A. The Right to Employ Home Country Personnel of Choice to Control and Manage Enterprises in the Host Country Is Manifest on the Face of the Treaty, from its Background and Negotiating History and from its Legislative and Administrative Implementation.

Treaties of establishment, of which the FCN treaties are the most recent form, have been a central feature of U.S international economic policy from the beginnings of the Republic. The first establishment treaty was signed with France in 1778, eleven years before adoption of the Constitution, and was the first treaty of any kind concluded by the United States. Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn. L. Rev. 805 (1958) (cited hereafter as Walker, *FCN Treaties*); S. Metzger, *Commercial Treaties of the United States and Private Foreign Investment,* in International Law, Trade and Finance: Reality and Prospects 147-48 (1963). Such treaties are designed to lay the basis for fruitful, stable and effective commercial relations between the parties and to advance American economic foreign policy objectives. Walker, *FCN Treaties supra,* at 809. *See also* Message of President to United States Senate Transmitting Treaty, Senate Exec. O, 83d Cong. 1st Sess. 2 (1953) (transmitting a Report of the Secretary of State to the President describing the Japanese treaty).

Viewed in the light of this purpose, the experience under the Japanese Treaty has been spectacularly successful. In 1953, when the Treaty was signed, trade and investment between the two countries were almost dormant. By 1980, U.S. trade with Japan amounted to over $50 billion. The Japan-United States Economic Relations Group, Supplemental Report Prepared for the President of the United States and the Prime Minister

of Japan at iii, 24 (Oct. 1981). Bilateral direct investment has also flourished. By 1980, Japanese direct investment in the United States, which helps to alleviate the impact of the imbalance in merchandise trade, rose to $4.2 billion, according to U.S. Department of Commerce figures. Brief herein for the Japan External Trade Organization (JETRO) as *Amicus Curiae,* at 6. Of course, no one can tell what part the Treaty has played in this extraordinary performance. But both the Ministry of International Trade and Industry of the Government of Japan and JETRO believe that the Treaty, and specifically the employment right here in issue, have contributed significantly to the favorable trade and investment climate. Brief herein for the Ministry of International Trade and Industry of the Government of Japan as *Amicus Curiae;* Brief for Japan External Trade Organization as *Amicus Curiae, supra.*

It is in this broad policy perspective that the Treaty should be construed.

1. The Treaty text.

Article VIII(1) of the Treaty, 4 U.S.T. at 2070, provides:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, . . . executive personnel . . . and other specialists of their choice.

These words establish an unqualified right of foreign investors to employ "executive personnel . . . of their choice." According to Herman Walker, the chief architect of the post-war FCN treaties,[7] the language establishes this right on a "non-contingent" or unconditional basis. Walker, *FCN Treaties,* 42 Minn. L. Rev. at 811, 823. The force of the words of Article VIII(1) is intensified by analysis of the structure of the Treaty, and particularly by reference to Articles VII and I, with which the employment right is closely linked. *See* 638 F.2d at 554-55, 556, Pet. App. at 5a-6a, 8a.

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7 Dep't of State Airgram No. A-105 to American Embassy, Tokyo, Jan. 9, 1976, App. 157a.

In the State Department's view, "the heart of the treaty" is the establishment clause of Article VII(1). Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. 7, 1952, App. 130a; *see* Note from the U.S. High Commissioner for Germany (HICOG) to the German Federal Ministry of Foreign Affairs, Dec. 9, 1953, App. 230a. It gives nationals and companies of each party the right to conduct business and commercial activities within the territory of the other as freely as local citizens. In accordance with the realities of modern international business and the flexibility it requires, the provisions of Article VII(1) apply whether the business activities are conducted "directly or by an agent or through the medium of any form of lawful juridical entity." 4 U.S.T. at 2069. To this end, foreign investors are empowered equally to establish branches or to organize or acquire companies under the laws of the other party. Further, Article VII(1) specifies that they shall be permitted "to control and manage enterprises which they have established or acquired." *Id.*

Article VIII(1), containing the right to employ executive and specialist personnel, follows in sequence and is regarded by the State Department as the "companion" to Article VII. Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. 7, 1952, App. 130a. The State Department said of the same Article in the FCN treaty with Germany that the provision is

> an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel.

Foreign Service Despatch No. 2529 from the U.S. High Commissioner for Germany (HICOG) to the Dep't of State, March 18, 1954, App. 181a, 182a.

Completing the equation, Article I(1) of the Treaty provides for the entry of nationals of each Treaty partner into the territory of the other for the purpose of carrying on trade and commercial activity. 4 U.S.T. at 2066. The interrelationship

among the management and control rights granted by Articles VII(1) and VIII(1) and the rights of entry and sojourn granted by Article I(1) was explained by Secretary of State Acheson in 1949 upon the signing of a proposed FCN treaty with Uruguay containing similar provisions:

> [The treaty] provides, for example, that citizens of one country may set up and operate business enterprises in the other on the same footing as citizens of that country. They will also be able to obtain entry into that country for managers and technicians from their own country who are needed in order to operate their enterprises effectively.

21 Dep't State Bull. 909 (1949).

In general, the postwar FCN treaties contemplate three different levels of rights: (i) those contingent on most-favored-nation treatment, in which the foreign investor is entitled to the highest level of protection granted to citizens of any foreign country (*see* Treaty Article XXII(2)); (ii) those contingent on national treatment, in which the foreign investor is entitled to the same level of protection as that granted to domestic citizens (*see* Treaty Article XXII(1)); and (iii) those that are non-contingent, the contents of which are specified in the Treaty and are not dependent on the treatment of anyone else, domestic or foreign. Walker, *FCN Treaties*, 42 Minn. L. Rev. at 810-811. Significantly, although the Article VII(1) right to conduct business is based on a national treatment standard, no such qualification is imposed on the employment right of Article VIII(1) or the entry and sojourn rights of Article I(1). Walker makes specific reference to Article VIII(1) of the Japanese Treaty as a provision "going beyond national treatment." Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 386 & n. 62 (1956); *see* Walker, *FCN Treaties, supra*, at 813.[8] Indeed, the Article VIII(1)

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8 It is significant that in this same Article VIII, paragraph 3, dealing with scientific, educational, religious and philanthropic activities, and associations formed for such purposes, is expressly limited to national and most-favored nation treatment.

employment provision has no function except to make the right to employ key personnel unconditional. A national treatment standard "in all that relates to the conduct of the activities" of the foreign investor is already secured by Article VII(1). 4 U.S.T. at 2069.

2. The treaty background and negotiating history.

The Japanese Treaty was one of 12 FCN treaties concluded by the United States in the post-World War II period.[9] This renewal of the traditional policy favoring treaties of establishment was an integral part of U.S. post-war international economic policy. S. Exec. Rep. No. 5, 83d Cong., 1st Sess. 2 (1953); *see also* 99 Cong. Rec. 9312-13 (1953) (remarks of Senator Hickenlooper, Chairman, Foreign Relations Committee); *Commercial Treaties: Hearing before a Subcommittee of the Senate Committee on Foreign Relations,* 83d Cong., 1st Sess. at 2 (1953) (statement of Samuel C. Waugh, Ass't Sec'y of State for Econ. Affairs) (hereafter 1953 Hearing). After a review of the earlier experience with FCN treaties, the State Department prepared a standard draft to serve as the basis for negotiations with many of our principal enterprise-economy

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9 *Republic of China,* 1946, 63 Stat. 1299, T.S. No. 1871; *Italy,* 1948, 63 Stat. 2255, T.I.A.S. No. 1965 (Supplemented by Agreement of Sept. 26, 1951, Sen. Exec. H., 82d Cong., 2d Sess.); *Uruguay,* 1949 (Sen. Exec. D., 81st Cong., 2d Sess.); *Ireland,* 1950, 1 U.S.T. 785, T.I.A.S. No. 2155; *Colombia,* 9 Stat. 881, T.S. No. 54; *Ethiopia,* 1951, 4 U.S.T. 2134, T.I.A.S. No. 2864; *Israel,* 1951, 5 U.S.T. 550, T.I.A.S. No. 2948; *Greece,* 1951, 5 U.S.T. 1829, T.I.A.S. No. 3057; *Denmark,* 1951, 12 U.S.T. 908, T.I.A.S. No. 4797; *Japan,* 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863, *Federal Republic of Germany,* 1954, U.S.T. 1839, T.I.A.S. No. 3853; *Nicaragua,* 1956, 9 U.S.T. 449, T.I.A.S. No. 4024; *Netherlands,* 1956, 8 U.S.T. 2043, T.I.A.S. No. 3942; *Korea,* 1956, 8 U.S.T. 2217, T.I.A.S. No. 3947. The treaties with Ethiopia and Iran are abridged versions. Office of the Ass't Legal Adviser for Treaty Affairs, *Friendship, Commerce, and Navigation and Similar Treaties or Other International Agreements in Force in Whole or in Major Part,* Dep't and Foreign Service Series 222 (Dep't of State Pub. 9173, Dec. 1980).

trading partners. *Commercial Treaties: Hearing before a Subcommittee of the Senate Committee on Foreign Relations*, 82d Cong., 2d Sess. at 3 (1952) (statement of Harold F. Linder, Dep. Ass't Sec'y of State for Econ. Affairs) (hereafter 1952 Hearing); Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. 7, 1952, App. at 130a-33a; Note from the U.S. High Commissioner for Germany (HICOG) to the German Federal Ministry of Foreign Affairs, Dec. 9. 1953, App. at 230a. The language of these FCN treaties, as they finally emerged, was not always identical. The standard draft itself was evolving over the period of the negotiating campaign, and there are occasional clarifications or changes in language to take account of the suggestions and needs of a negotiating partner. *See generally* Walker, *FCN Treaties*, 42 Minn. L. Rev. at 805-09; Note from the U.S. High Commissioner for Germany (HICOG) to the German Federal Ministry of Foreign Affairs, Dec. 9, 1953, App. at 230a-31a; Message of President to Senate, S. Exec. O, *supra* p. 19, at 3; 1952 Hearing, *supra*, at 2. But it is clear that the post-war treaties represented a single policy impulse, and are to be considered and construed *in pari materia*. *See* Walker, *FCN Treaties*, 42 Minn. L. Rev. at 807. The history of the negotiation of these treaties and of their consideration by the Senate confirms the view of the employment right that derives from the text.

The initiative for the post-war FCN treaties came from the United States, and this is particularly true of the provisions covering corporate activity and international investment, which were the main innovations. *Id.* at 806, 817; Sen. Exec. Rep. No. 5, *supra* p. 23, at 2; 99 Cong. Rec. at 9312 (remarks of Senator Hickenlooper). Although in the present case it is the exercise of control and management rights by a Japanese investor that is at stake, those rights were included in the Treaty not at the instance of Japan, but because the United States deemed them essential for the protection of its own investors abroad. As Senator Hickenlooper said at the time:

> [I]t is essential that we not view [these] conventions simply as documents which give aliens limited rights in

> this country. In fact, since there are many more Americans doing business abroad than there are aliens doing business in this country, Americans as measured in either numbers or in volume of business get more advantages abroad than we accord advantages here to aliens.

Id. at 9313.

Indeed, the United States insisted on retaining the Article VIII(1) employment right over the initial resistance of a number of its negotiating partners. The State Department responded to Germany's suggestion that the executive employment article should be stricken by noting that "[t]he provision is attributed some importance by American interests; and its omission from the treaty would be calculated to arouse apprehensions concerning Germany's intentions . . . ." Note from the U.S. High Commissioner for Germany (HICOG) to the German Federal Ministry of Foreign Affairs, Dec. 15, 1953, App. 254a, 256a; *see also* Foreign Service Despatch No. 2529 from the U.S. High Commissioner for Germany (HICOG) to the Dep't of State, March 18, 1954, App. 181a, 182a. With respect to Article VIII(1) of the Japanese Treaty, see Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. 7, 1952, App. 130a, 131a-33a, providing arguments responding to Japanese proposals to alter its content. Similarly Montevideo's unwillingness to accept a provision granting an absolute right to U.S investors to place U.S. citizens in executive positions was a major point of contention in FCN treaty negotiations with Uruguay. Dep't of State Airgram No. 385 from U.S. Embassy, Montevideo, to the Dep't of State, Nov. 8, 1949, App. 89a, 90a; Dep't of State Airgram No. 262 to U.S. Embassy, Montevideo, Nov. 10, 1949, App. 92a.

The reason for this special concern for the right of foreign investors to engage key personnel "of their choice" is clear. If a host country could limit that right, it would severely undercut the ability of investors to control and manage their investments, an ability that the United States sought to assure

through these FCN treaties. 99 Cong. Rec. at 9312 (remarks of Senator Hickenlooper). As the contemporaneous negotiating documents and legislative history show, it was understood that for the right to control to be effective, the investor must be free to choose management personnel. *See* Foreign Service Despatch No. 2529 from the U.S. High Commissioner for Germany (HICOG) to the Dep't of State, March 18, 1954, App. at 182a; Note from the U.S. High Commissioner for Germany (HICOG) to the German Federal Ministry of Foreign Affairs, Dec. 9, 1953, App. at 230a-31a.

Laws limiting alien employment were a particular threat to the foreign investor's control. *See* 1952 Hearing, *supra,* at 4 (statement of Dep. Ass't Sec'y Linder: nonbusiness hazards "assume many forms [including] . . . rigid employment controls . . . ."); S. Exec. Rep. No. 5, *supra* p. 23, at 4; 1953 Hearings, *supra,* at 2. While such laws were facially neutral in the sense that they applied equally to both domestic and foreign employers, their practical impact was on the foreign investor seeking to employ its own nationals in management level positions. The purpose of Article VIII(1) to override employment restrictions under local law is clearly stated in the Senate Executive Report accompanying the Japanese Treaty:

> Paragraph 1 of this Article states that companies doing business in the territory of the other party may hire "accountants and other technical experts," attorneys, agents, etc., of their choice and that laws regarding the nationality of employees are not to prevent such nationals and companies from carrying on their activities in connection with the planning and operation of the specific enterprises with which they are connected.

S. Exec. Rep. No. 5, *supra* p. 23, at 4 (1953).

The meaning of Article VIII(1) is further elucidated by reference to the parallel provision in the Danish FCN Treaty. There the employment article tracks the language of Article

VIII(1) of the Japanese treaty, except that it adds the clarifying phrase "regardless of nationality" after the words "of their choice." It is accepted that this additional language was not designed to work any change in the meaning of the article. 1953 Hearing, *supra,* at 5, 9 (tabular comparison of FCN treaties submitted by Ass't Sec'y Waugh and Vernon G. Setser, Chief, Econ. Treaties Branch, Commercial Policy Staff, Dep't of State). On the contrary, it is a nonsubstantive variation of the type mentioned above, apparently inserted to clarify the meaning of the words "of their choice."

Walker summed up the rationale of Article VIII(1) as follows:

> [M]anagement is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from percentile restrictions and the like . . . .

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 Am. J. Comp. L. 229, 234 (1956) (hereafter Walker, *United States Practice*).

Despite its sweeping language, however, Article VIII(1) of the Japanese Treaty, like similar articles in other FCN treaties, was never intended to exempt the foreign investor from the generality of domestic labor legislation, nor does Sumitomo so claim. The suggestion of the Court below that this is the consequence of Sumitomo's position (638 F.2d at 559, Pet. App. at 14a) is untenable. The right granted is the right to employ managerial personnel of choice. It is hardly likely that a foreign investor would exercise that right to designate children to manage its enterprise or that a consular officer would issue an E-1 visa to a clearly ineligible person claiming to occupy a position of an "executive or supervisory" nature. Moreover, matters of "public health, morals and safety" are in any event reserved by the Treaty to the host country. Article I(3), 4 U.S.T. at 2066.

The intent of the negotiators was to secure the freedom of the foreign investor to employ its own home country nationals in management and other specialized positions. The United States was seeking assurance of the freedom to use American managers to run American investments abroad. The right claimed by Sumitomo is simply the reciprocal of the right the United States negotiated to secure.

3. Legislative and administrative implementation of the Treaty

Sumitomo's view as to the meaning of the Article VIII(1) employment right is also borne out by the legislative and administrative implementation of FCN treaty provisions by the United States. The INA was passed in 1952 in the midst of the post-war FCN negotiating campaign. In its relevant provisions it was recognized as complementary to those treaties. S. Exec. O, *supra* p. 19, at 3 (1953). Section 101(a)(15)(E) deals with aliens "entitled to enter the United States under and in pursuance of the provisions of a treaty of friendship, commerce and navigation. . . ." 8 U.S.C. § 1101(a)(15)(E). The section provides that a treaty trader visa will issue to an alien the purpose of whose entry is "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . ." Thus the right of entry in Article I of the Treaty and, by extension, the employment right of Article VIII(1) were understood by Congress to apply only to nationals of the other party to the Treaty, in this case Japan.

The linkage between the entry and sojourn rights provided by Article I(1) and the employment right of Article VIII(1) is even more explicitly spelled out in the implementing regulations under the INA. These provide that to be eligible for a treaty trader visa the alien must be

> employed by a foreign person or organization having the nationality of the treaty country. . . [and] be engaged in

> duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise . . . .

22 C.F.R. § 41.40(a) (1981). The indicia of "executive or supervisory character" are further elaborated in State Department instructions to consuls in foreign posts to consider

> the title of the position to which an applicant is destined, the location of the job in the firm's organizational structure, the duties involved, the degree to which the applicant will have ultimate control and responsibility for the firm's overall operations or a major component thereof, the number and skill levels of the employees within his responsibility, and whether he presently possesses executive or supervisory experience which would reasonably qualify him for the proposed assignment. . . . [L]evel of pay is another factor that may properly be considered. The consular officer may request such documentation as he feels necessary to satisfy himself that the position is indeed executive or supervisory in character, and should seek to elicit further info if necessary during the visa interview.

Dep't of State Telegram No. 089624 to Japanese Posts, ¶ 4, sent to all Diplomatic and Consular Posts on July 6, 1981, *reprinted in* 58 Interpreter Rel. 478, 479 (Sept. 17, 1981).

* * * *

The language of the Treaty, its negotiating history, and its contemporaneous and subsequent congressional and administrative construction, unite on a single, straightforward account of the right secured by Article VIII(1). It is the right of a foreign investor doing business in the territory of the host country to manage and control its local enterprise through

employment of home country nationals in executive positions, untrammeled by domestic legislation to the contrary. The enforcement of this right represents a solemn international obligation of the United States, not only to Japan, but to at least a dozen other countries with comparable treaty provisions. Equally, it represents a hard-won privilege for U.S. businesses operating in those countries, the continuance of which depends on continued scrupulous observance by this country of its reciprocal obligations.

B. Neither the Language nor the Legislative History of Title VII Evinces Any Intention to Abrogate the Rights of U.S. and Foreign Investors under FCN Treaties to Control and Manage Their Investments through the Employment of their Own Nationals in Management Positions.

1. Domestic legislation, such as Title VII, should not be construed to diminish treaty rights in the absence of an unambiguous expression of congressional intent to do so.

If plaintiffs were to prevail on these Title VII claims, there can be no doubt that the result would be a significant derogation from FCN treaty rights. A foreign investor's Treaty rights to control and manage its investment by employing home country nationals in executive positions, formerly unconditional, would henceforth be subject to domestic legislation establishing local preferences.

A cardinal principle of statutory interpretation is that repeals by implication are to be avoided. *Morton v. Mancari, supra*, 417 U.S. at 549-51. In the words of the Solictor General in a brief submitted to the Court this term, this principle "is by now axiomatic." Brief for the United States in *Weinberger v. Rossi*, No. 80-1924, at 25, citing *Watt v. Alaska*, 451 U.S. 259, 265-66 (1981); *United States v. Will*, 449 U.S. 200, 221 (1980); *TVA v. Hill*, 437 U.S. 153, 189 (1978).

In the present case, the rule against implied repeals is reenforced by an equally cogent independent principle: "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The injunction of *The Charming Betsy* applies with even greater force—"*a fortiorari*" in the words of the Solicitor General—when the proposed construction would violate "existing provisions or obligations under binding international agreements." Brief for the United States, *supra*, at 26. In cases involving treaty rights, this Court has laid down the requirement that "such purpose on the part of Congress [must be] clearly expressed." *Cook v. United States*, 288 U.S. 102, 120 (1933) (Brandeis, J.). The Court recently reiterated this requirement in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979): "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ." *Accord*, 41 Op. Att'y Gen. 170, 173 (1954) ("Without a clear expression of intention on the part of Congress to abrogate or restrict the application of a treaty, that purpose will not be implied.").

In the instant case, there is certainly no "explicit statutory language" in Title VII abrogating FCN treaty employment rights. Likewise, nothing in the legislative record of Title VII suggests that Congress intended to abrogate solemnly undertaken international obligations. It could hardly have been otherwise. In contrast to the FCN campaign of the 1950's, which was designed to provide protection for foreign investment as a basis for international economic revival and reconstruction (*see* 1952 Hearing, *supra*, at 2-4), Title VII of the Civil Rights Act of 1964 was an historic piece of domestic legislation, growing out of a native civil rights movement and responding to a wide range of evils in matters of employment in the United States. There is no indication that Congress even considered the impact of the legislation on FCN treaty obliga-

tions to foreigners. The policy orientations of the Treaty and Title VII are simply orthogonal.[10]

It is even harder to suppose that, by enactment of Title VII, Congress intended to limit the hard-won treaty rights of U.S. investors to employ home country citizens for key positions abroad. It would be wholly inconsistent with U.S. foreign economic policy objectives to release foreign FCN partners from their existing obligations not to discriminate against U.S. citizens and not to prefer their own nationals in executive positions. Yet, since rights under FCN treaties are reciprocal, just such a diminution of the management level employment rights of U.S. investors abroad would follow from the application of Title VII to foreign investors in the United States. Surely, if this were a purpose that animated Title VII, there would have been at least some reflection of it in the Congressional debates over the statute.

2. The administrative duplication, confusion and conflict that would result from the application of Title VII in this case provide independent grounds for declining to attribute such an intention to Congress.

To apply Title VII to the nationality based employment practice authorized by the Treaty and the INA would create a maze of administrative duplication, confusion and conflict, instead of the stable, reliable and predictable framework envisioned by the Treaty for international economic activities. *See* Walker, *FCN Treaties*, 42 Minn. L. Rev. at 809.

The State Department operates an elaborate system for screening applicants for treaty trader visas. The prospective

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10 The only reference to international matters in Title VII comes at the beginning, in 42 U.S.C. § 2000e-1, which provides that the Act "shall not apply to any employer with respect to the employment of aliens outside any State. . . ." The object of this provision is clear. It is to prevent the extraterritorial application of the act with respect to persons not within the allegiance and therefore not subject to the jurisdiction of the United States. It reenforces the overall domestic focus of the legislation.

E-1 visa entrant must appear before a U.S. consular official abroad and provide satisfactory evidence that he meets well-defined criteria before being granted treaty trader status and permitted to enter the United States. The State Department has broad discretion to define the criteria for issuance of the visa and to ensure that the number of treaty traders is appropriately limited.[11] In addition, each treaty trader's status is subject to annual review by the INS to insure that the statutory criteria are met on a continuing basis. 8 C.F.R. § 214.2(e) (1981).

The enforcement of Title VII is also committed to an elaborate administrative apparatus. Complainants must apply first to the EEOC, which undertakes a complicated investigatory and conciliation process, culminating in a determination whether the agency should proceed itself or leave the complainant free to sue or both. 42 U.S.C. § 2000e-5(b) to 5(f)(1); 29 C.F.R. §§ 1601.15-.29 (1981). In either case there may be court review of the question whether the employer has engaged in a prohibited discriminatory employment practice.

As the Second Circuit foresaw, Title VII cases involving treaty traders will almost inevitably call forth the BFOQ defense. 638 F.2d at 559, Pet. App. at 14a-15a. The criteria suggested by the court below for resolving this issue are substantially similar to those applied by the State Department in making the treaty trader determination in the first place and by the INS in its annual reviews. Thus the EEOC and the courts would as a practical matter be in the position of second guessing—or collaterally attacking—the visa determination of the State Department and the INS.

Such conflicts between determinations made by the EEOC and the State Department would be unavoidable no matter how heroic the attempts at interagency coordination. Even if the INA criteria and the BFOQ requirements were verbally identical, the visa determination made by the consular officer abroad acting under the INA would not foreclose a Title VII

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11 *See* Dep't of State Telegram No. 089624, *supra* p. 29; *U.S. Tightens Japanese Visas*, N.Y. Times, Oct. 7, 1980, Section D, at 1.

review. The effect would be to circumvent the strict limitations this Court has traditionally maintained on review of visa decisions:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. . . . The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

Mathews v. Diaz, 426 U.S. 67, 81-82 (1976) (footnotes omitted). As a matter of fact, the court below in remanding this very case has in effect called for reexamination by the judicial branch of the determinations made by the Executive in issuing treaty trader visas to Sumitomo's managerial employees.

Perhaps it is within the power of Congress, by apt statutory language, to create such a quagmire if it wishes to do so. But certainly it should not be conjured up by the courts in the absence of any indication that Congress intended such a result or was even aware of the possibility.

* * * *

In *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), this Court was urged to apply remedial domestic legislation establishing fundamental rights of employees and obligations of employers in a manner that was inconsistent with international law. The relevant statutory language there, like that of Title VII, was in terms unqualified. Nevertheless, in considering whether the statute reached so far, the Court remarked that petitioners were

> unable to point to any specific language in the Act itself or in its extensive legislative history that reflects such a congressional intent.

372 U.S. at 19. The Court declined to apply the Act:

> [F]or us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed."

Id. at 21-22 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

The present cases equally are ruled by that injunction.

III.

SUMITOMO, AS A WHOLLY-OWNED U.S. SUBSIDIARY OF A JAPANESE INVESTOR, MAY INVOKE THE EMPLOYMENT RIGHT GRANTED BY ARTICLE VIII(1).

In their cross-petition, respondents put in issue whether Sumitomo is eligible to claim the Article VIII(1) employment right. Relying on Article XXII(3) of the Treaty, a definitional provision, they argue that since Sumitomo is incorporated under the laws of New York, Sumitomo is a company "of the United States" and therefore is not entitled to claim the benefits accorded to Japanese nationals and companies pursuant to Article VIII(1) of the Treaty.[12] Both the Court below and the Fifth Circuit in *Spiess v. C. Itoh, supra,* correctly

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12 In this connection, the courts below commonly make reference to Sumitomo's "standing" to invoke Article VIII(1) of the Treaty, but such references do not import standing in its traditional sense as an element of justiciability. It is undisputed that for purposes of traditional "standing" under Article III of the Constitution, the interests that Sumitomo is asserting are within the "zone of interests" to be protected by the Treaty, and that Sumitomo's interests will be directly affected by any interpretation of the Treaty to be rendered in this action. *See Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

rejected this attempt to deny Article VIII(1) rights to locally incorporated subsidiaries as inconsistent with both the terms and the purposes of the Treaty. On this point the Second Circuit opinion bears repeating:

> We are satisfied that the Treaty's provisions may be invoked by a wholly-owned Japanese subsidiary incorporated in the United States to the same extent that they may be availed of by Japanese corporations or firms operating in the United States. To hold that the Japanese business enterprise forfeits its rights under the Treaty merely because it chooses to function through a wholly-owned locally-incorporated subsidiary would in our view disregard substance for form, something which we have previously rejected in treaty construction. *Reed v. Wiser*, 555 F.2d 1079, 1085-86 (2d Cir.), *cert. denied*, 434 U.S. 922 (1977). Moreover, such a reading would overlook the purpose of the Treaty, which was not to protect foreign investments made through branches, but rather to protect foreign investments generally. See generally, *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966); *Maximov v. United States*, 299 F.2d 565, 568 (2nd Cir. 1962), *affd.*, 373 U.S. 49 (1963). . . . To adopt such a reading would also in our opinion do violence to the admittedly unitary structure of Articles VII and VIII, see, e.g., Foreign Service Despatch No. 2529, from High Commissioner for Germany to the Department of State, dated March 18, 1954, p. 1. It is unlikely that the parties to the Treaty would have agreed to grant each other broad rights to establish and manage subsidiaries abroad in Article VII, and then gone on to bar those same subsidiaries from invoking almost all of the substantive provisions which the Treaty contains.

638 F.2d at 556-57; Pet. App. at 7a-8a. *See also* Walker, *United States Practice*, 5 Am. J. Comp. L. at 233. The court went on to note that disparate treatment as between subsidiaries and

branches would result in an unintended "crazy-quilt pattern." [13] 638 F.2d at 556, Pet. App. at 8a. The Fifth Circuit, in *Spiess v. C. Itoh, supra*, fully endorsed the position of the Court below that the Article VIII(1) right may be invoked by local subsidiaries. 643 F.2d at 358-59, Pet. App. at 71a.

Both courts of appeals were united in treating Article XXII(3), relied on by respondents, as defining a company's nationality merely for the purpose of recognizing its status as a legal entity and not for the purpose of restricting substantive Treaty rights. 638 F.2d at 557, Pet. App. at 11a; *Spiess v. C. Itoh, supra,* 643 F.2d at 357-58, Pet. App. at 69a. This conclusion is supported by the negotiating history of the Treaty and similar FCN treaties. For example, during the negotiation of the treaty with the Netherlands, U.S. negotiators emphasized to their counterparts that the definitional provision analogous to Article XXII(3) of the Japanese Treaty

> was *not* calculated to detract in any way from the rights and privileges a "controlled company" would otherwise enjoy. . . . [T]he treaty is always a floor and not a ceiling. The effect of the [State Department] legal adviser's formulation was to assure that the "controlled company" will always, as a minimum, get everything that the parent company gets as a matter of treaty *right*—but was not calculated to detract from any additional privileges that the "controlled company" may actually have. . . . The [State] Department has the same interests as [the Dutch negotiators] in avoiding damage to the position of "controlled companies", because Americans

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13 Foreign direct investment predominantly takes the form of locally incorporated subsidiaries. The Department of Commerce, *Survey of Current Business,* August, 1980, indicates that for the period 1966-1979, approximately 85% of U.S. direct investments abroad and about 94% of foreign direct investments in this country were made through subsidiaries.

> have "controlled companies" abroad just as the Dutch have them in the U.S.

Official-Informal Letter from Herman Walker, Jr., Trade Agreements and Treaty Division, Commercial Policy Staff, Dep't of State, to Counselor for Economic Affairs, American Embassy, the Hague, Netherlands, Oct. 28, 1955, App. 287a, 288a (emphasis in original).

The same views were expressed by the Department during the negotiation of the Japanese Treaty with specific reference to Article XXII(3):

> Mr. Nagai [a Japanese negotiator] then asked what "juridical status" meant, and inquired whether the recognition of juridical status mentioned in paragraph 3 [of Article XXII] meant anything more than the recognition of the existence of a juridical person.
>
> Mr. Bassin [an American negotiator] replied that "juridical status" meant "legal status", the legal position of an organization in, or with respect to, the rest of the community. The recognition mentioned in the second sentence of paragraph 3, he added, meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party.

Dep't of State Despatch No. 13 from USPOLAD, Tokyo, to Dep't of State, Washington, D.C., Apr. 8, 1952, App. 136a, 143a-44a; *see also* Walker, *Provisions on Companies,* 50 Am. J. Int'l L. at 380-81, 383 (distinguishing between "civil" and "functional" capacities of companies and noting that recognition of status and nationality does not create substantive rights); Dep't of State Airgram No. A-105 to American Embassy, Tokyo, Jan. 9, 1976, App. 157a, 158 (confirming position of State Department that Article XXII(3) is merely meant to establish a "procedural test" for determining the status of an association); Letter from Lee R. Marks, Dep. Legal Adviser, Dep't of State, to Abner W. Sibal, Gen. Counsel, EEOC,

Oct. 17, 1978, App. 94a, *reprinted in* 73 Am J. Int'l L. 281 (1979).[14]

As discussed above, practice under the INA treaty trader provisions illuminates the meaning of employment rights granted by the Treaty. See pp. 28-30, *supra*. Throughout the period that the Treaty has been in force, treaty trader visa applications for employees of locally incorporated subsidiaries of Japanese companies have been treated on a par with applications for employees of branches. Both subsidiaries and branches are deemed Japanese companies:

> The nationality of a firm is determined for the purpose of section 101(a)(15)(E) [of the INA] by the nationality of those persons who own the principal amount (i.e., more than 50 percent) of the stock of that corporation, regardless of the place of incorporation.

9 Foreign Affairs Manual, Part II, § 41.40, Note 8; *see also* Note 16. The rule has also been applied consistently by the INS. *See, e.g., Matter of N____ S____*, VII I. & N. Dec. 426, 428 (1957); *Matter of Z____ and R____*, VIII I. & N. Dec. 482 (1959).

The underlying rationale was expressed by the Department of State in the negotiation of similar employment provisions in the FCN treaty with Germany:

> The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of

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14 A later Department of State letter takes a contrary view. Letter from James R. Atwood, Dep. Legal Adviser, Dep't of State, to Lutz A. Prager, Ass't Gen. Counsel, EEOC, Sept. 11, 1979 (App. 307a), *reprinted in* 74 Am. J. Int'l L. 158 (1980). The Second Circuit observed that "both letters were conclusory in tone, providing little guidance as to how the author reached the position adopted. Finally, neither of the letters referred to any documentary evidence supporting its position, nor did the 1979 letter explain how the 1978 letter writer had fallen into error." 638 F.2d at 558 n.5, Pet. App. at 12a n.5; *see also, Spiess v. C. Itoh, supra*, 643 F.2d at 358 n.3, Pet. App. at 70a n.3.

> liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on. Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. The important consideration is not whether the corporate employer is domestic or alien as to juridical status. The controlling factors are, instead: (a) whether the corporation is engaged in substantial international trade principally between the United States and the other treaty country; (b) whether it is a "foreign organization" in the sense that the control thereof is vested in nationals of the other treaty country, the customary test being whether or not a majority of the stock is held by such nationals; and (c) whether the individual alien who intends to engage in international trading activities in the service of the corporation is duly qualified for status as a treaty trader under 22 C.F.R. 41.70, 41.71 and other applicable regulations.

Dep't of State Instruction No. A-852 to the U.S. High Commissioner for Germany (HICOG), Bonn, Jan. 21, 1954, App. at 160a-61a.

The result below can be reached on a theory similar to that of the U.S. negotiators (and of the INA regulations), piercing the corporate veil and considering the U.S. subsidiary as a "company of Japan" for the purposes of Article VIII(1). *See* 638 F.2d at 557-558, Pet. App. at 11a-12a; *Spiess v. C. Itoh, supra,* 643 F.2d at 358-59 & n.5, Pet. App. at 71a & n.5. A slightly different technical approach is to treat the U.S. subsidiary as asserting the rights of its Japanese parent, which is admittedly a "company of Japan." *See* 638 F.2d at 555-556, Pet. App. at 7a-8a. The difference is one of form, not

substance. Both Courts recognized that the Treaty was designed to permit decisions as to the form of foreign investment to respond to the realities of international business, undistorted by legalistic technicalities. 638 F.2d at 555-56, Pet. App. at 7a-8a; *Spiess v. C. Itoh, supra,* 643 F.2d at 358-59, Pet. App. 71a & n.5. The common result reached in the two Circuits implements this design. *Cf. Jordan v. Tashiro,* 278 U.S. 123 (1928) (treaties to be liberally construed in order to effectuate purposes).

To change the rules now so that important legal consequences will hinge on the foreign investor's choice of the form of enterprise by which it does business would be to turn back the clock on the entire post-war FCN treaty era.

IV.

IF TITLE VII APPLIES TO SUMITOMO'S PREFERENCE FOR JAPANESE NATIONALS IN MANAGERIAL POSITIONS, THE BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION SHOULD BE LIBERALLY APPLIED.

The Second Circuit should not have reached the question whether the BFOQ exception to Title VII applies to Sumitomo's practice of filling managerial positions with Japanese nationals because, as shown above, the practice does not violate the Civil Rights Act. If Title VII is to be applied, however, the Court below was certainly correct in suggesting that recognition should be given to the foreign investor's Treaty right to choose its own managers as well as to attributes of Japanese nationality, such as linguistic and cultural skills, knowledge of Japanese products, markets, customs and business practices, familiarity with the personnel and workings of the principal or parent enterprise in Japan, and acceptability to those persons with whom the company or branch does business. If such a reading of the BFOQ exception to Title VII is the only way to provide for the treaty employment right, then obviously that reading must be adopted. But one might well conclude that the effect on the BFOQ exception is a further argument against holding that Title VII is applicable.

The point is, of course, that all the factors listed by the court below can best be given recognition, not through the BFOQ exception, but by applying according to its terms the treaty right of Japanese direct investors to control and manage their enterprises in this country by engaging "executive personnel . . . and other specialists of their choice." Treaty, Article VIII(1), 4 U.S.T. at 2070.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit should be reversed and this case remanded with directions to dismiss.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner and Cross-Respondent,
-v.-
LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,
Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner and Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER AND ELIZABETH WONG,
Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS AND CROSS-PETITIONERS

COUNTERSTATEMENT OF THE CASE

This case is before the Court upon issuance of a writ of *certiorari* to the United States Court of Appeals for the Second Circuit. The Second Circuit heard this case on interlocutory appeal, and affirmed the order of the District Court of the Southern District of New York denying Sumitomo Shoji Amer-

ica, Inc.'s motion to dismiss the complaint.[1] *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981)

The complaint states that the case "involves sex and national origin discrimination in employment" (App. 6a). The first cause of action alleges discrimination against women by restricting them to clerical jobs and failing to train and promote them to higher positions. The second cause of action alleges discrimination on the basis of nationality,[2] again alleging the same job restrictions and failure to train or promote (App. 9a).

The case is brought as a class action on behalf of all female Sumitomo employees and all women who have left Sumitomo because of its discriminatory policies and practices (App. 7a).[3]

Prior to filing its motion to dismiss, Sumitomo provided partial answers to interrogatories (App. 34a-69a). These answers disclose that Sumitomo is incorporated in the State of New York. It maintains its principal place of business in New York City and has branch offices in nine other American cities (App. 34a-36a). Sumitomo also has five wholly-owned American subsidiaries or affiliates.[4] As of December 1, 1977, Sumitomo employed approximately 464 persons, 230 of whom worked in New York City. Nationwide the company employed 199 women, 96 of whom worked in New York City (App. 37a-41a). Sumitomo broadly

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[1] Citations to the Appendices to the Petition For A Writ of *Certiorari* are indicated as Pet. App. ___a. Citations to the Joint Appendix are indicated as App. ___a.

[2] Petitioner and cross-respondent ("petitioner" or "Sumitomo") emphasizes in its brief that respondents' and cross-petitioners' ("respondents") complaint uses the word "nationality" rather than "national origin" in the second cause of action. See Pet. Br. 9, 17. This Court, however, has used the word "nationality" interchangeably with "national origin." See, *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). Apparently, Sumitomo itself understands the interchangeability of nationality and national origin. *See*, Affidavit of J. Portis Hicks ¶ 3 (App. 73a), which refers to plaintiffs' claims as being based upon discrimination "by reason of their national origin."

[3] The parties have agreed to postpone filing and consideration of a motion for class certification pending resolution of the motion to dismiss.

[4] See, Petition For A Writ Of *Certiorari*, 4, n. 1. These corporations are Distributor Metals Corp., Emko Stainless Steel Inc., Fairway Village Inc., Industrial Metals, Inc., and Rising Sun Stainless Steel, Inc.

classifies employees as "executives," "managerial and supervisory" and "others" (App. 40a).

The record contains Sumitomo's Equal Employment Opportunity Employer Information ("EEO-1") reports for its New York City office which were filed with the Equal Employment Opportunity Commission ("EEOC") for 1975 and 1976 (App. 58a-69a). The 1976 EEO-1 reveals that Sumitomo listed 31 of 219 persons employed as "officials and managers." Twenty-eight of these 31 positions were filled by "Orientals."[5] All of these officials and managers were males. Presumably, therefore, Sumitomo employed three white male officials and/or managers.[6] Under the heading "professionals" Sumitomo states it employed 35 persons. Twenty-five of these were "Orientals." The other 10 were white males. No women were employed as professionals.

The 1976 EEO-1 states that 43 persons were employed as "sales workers," of whom 37 were Oriental males. Six, therefore, were white males. No women were employed as sales workers. Sumitomo employed women only in the "technician" and "office and clerical" categories (App. 67a).

Sumitomo has not yet answered interrogatories concerning its selection criteria for hiring and promotion (App. 42a). Therefore, there is no record with regard to Sumitomo's hiring and promotion practices and procedures. Sumitomo has stated in answer to an interrogatory that neither sex nor national origin is a bona fide occupational qualification ("bfoq") for any job within the company (App. 54a-55a). Nonetheless, Sumitomo does plead as an affirmative defense that its employment practices are justified by and exist pursuant to bona fide occupational qualifications and business necessity (App. 82a).

The district court denied Sumitomo's motion to dismiss the complaint on June 5, 1979 (Pet. App. 19a-37a). The district court noted that Sumitomo was relying on Article VIII(1) of the Treaty

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[5] "Orientals" is a minority group category used by EEOC for EEO-1 reporting (App. 61a, 67a).

[6] The EEO-1 indicates that Sumitomo employed no "Negroes," "American Indians," or "Spanish Surnamed Americans" in any of the job classifications discussed above.

of Friendship, Commerce and Navigation between the United States and Japan, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863 ("Treaty" or "FCN") which gives nationals and companies of either party the right to hire executive personnel, as well as certain other experts, professionals and specialists "of their choice." The court found, however, that Sumitomo was not a company of Japan, as defined by Article XXII(3). The court pointed out that this definitional article was consistent with "traditional rules of corporate law which . . . accord to the corporation the citizenship of its place of incorporation" (Pet. App. 23a).

Thereafter, Sumitomo moved for reargument, citing certain documents which the State Department had released to the parties after the court's initial decision. The district court, after considering these documents in detail, adhered to its initial decision (Pet. App. 45a-61a). The court determined that these additional documents merely established that, pursuant to Article VII(1) of the Treaty, Sumitomo was entitled to national treatment which would protect it against discrimination (Pet. App. 57a-60a). The court also noted that the drafters of the Treaty used language precisely, and knew how to give locally incorporated subsidiaries, as distinguished from their parent corporations, substantive rights (Pet. App. 59a). In reaching its decision, the district court noted that the State Department agreed that the negotiators did not intend to give Article VIII(1) rights to locally incorporated subsidiaries, but merely intended to protect such corporations by the more general provisions of Article VII (Pet. App. 56a).[7]

The court of appeals affirmed the district court's ruling. It held that Sumitomo could invoke Article VIII(1), but found that this provision did not excuse Sumitomo from complying with Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.* The court held that the intent of the Treaty negotiators was to

[7] In reaching this conclusion, the State Department rejected an earlier opinion of its Deputy Legal Adviser Lee R. Marks (App. 94a-97a) which was rendered before the Department had fully analyzed the record of the Treaty negotiations. See, letter of Deputy Legal Adviser James R. Atwood, dated Sept. 11, 1979 (App. 307a-308a).

protect "companies operating abroad from local legislation restricting the employment of non-citizens" rather than to allow them to discriminate in the host countries (Pet. App. 13a-14a). The court stated:

> [N]o evidence supports Sumitomo's broad interpretation which, carried to its logical conclusion, would immunize a party not only from Title VII but also from laws prohibiting employment of children, . . . laws granting rights to unions and employees, . . . and the like (Pet. App. 14a).

The Second Circuit, however, structured a special bona fide occupational qualification exception under Title VII for use by a domestic subsidiary of a Japanese corporation. The court, after noting that normally the bfoq exception is to be narrowly construed, instructed that "due weight" should be given to "the Treaty rights and unique requirements of a Japanese company doing business in the United States, including such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business" (Pet. App. 14a-15a).

SUMMARY OF ARGUMENT

The plain language of the Treaty, an analysis of its negotiating history, and the opinions of both the State Department and the Ministry of Foreign Affairs of Japan, establish that Sumitomo, as a New York incorporated subsidiary of a Japanese company, obtains no rights under the "of their choice" provision of Article VIII(1). *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir.) (Reavley, J., dissenting), *reh'g en banc granted*, 654 F.2d 302 (1981), *order granting reh'g en banc vacated*, 664 F.2d 480 (1981).

Sumitomo's practice of employing almost exclusively Japanese men as executive, managerial, supervisory and sales personnel is

inherently discriminatory on national origin, race and sex grounds. The ruling in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), that an employer's United States citizenship requirement is not a *per se* violation of Title VII, does not immunize Sumitomo's practices from judicial scrutiny.

Article VIII(1) of the Treaty, even if applicable to Sumitomo, does not give the petitioner the right to engage in prohibited employment discrimination. Article VIII(1) was intended to eliminate employment bars based upon alienage. It was not intended to sanction employment discrimination or override state anti-discrimination laws in effect at the time the Senate ratified the Treaty. Moreover, the negotiators well understood the right, if not the obligation, of both nations to enact additional anti-discrimination employment laws after ratification of the Treaty.

Contrary to the contention of Sumitomo, the State Department's visa application review procedures do not insure that a domestic employer who employs treaty traders will do so in conformity with Title VII requirements. Moreover, the State Department visa application proceedings do not preclude Title VII review by the EEOC and the federal courts. *Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974).

The Second Circuit's attempt to broaden Title VII's bfoq exception conflicts with this Court's ruling in *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977), as well as with the applicable EEOC Guidelines, 29 C.F.R. §§ 1604.2 and 1606.4. The fact that Sumitomo conducts business in an international context does not justify a relaxed bfoq standard. *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981).

ARGUMENT

I.

A DOMESTIC SUBSIDIARY OF A JAPANESE CORPORATION MAY NOT INVOKE ARTICLE VIII(1) OF THE TREATY.

In accordance with the clearly defined grant of rights by the FCN, only nationals and companies of Japan may invoke the "of their choice" employment provisions of FCN Article VIII(1). This interpretation is derived from the plain language of the Treaty and is consistent with the position of the State Department, and the Japanese Ministry of Foreign Affairs, as well as with the Treaty negotiations documents.

Article VIII(1) covers two distinct rights. In the first sentence, it gives "nationals and companies of either party" the right to engage executive personnel, among others, "of their choice." In the second sentence, the Article permits "such nationals and companies" the right to engage certain professionals and experts, regardless of whether these persons are qualified to practice their professions in the territories of the other party, to perform limited internal functions for "such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest within such territories."

Thus, the drafters explicitly drew a distinction within Article VIII(1) itself between "nationals and companies of either party" and "enterprises in which they have a financial interest," e.g. a domestic subsidiary corporation. As Sumitomo is a company of the United States pursuant to Treaty definition (Article XXII(3)), under the plain language of the Treaty, Sumitomo may not invoke the "of their choice" provision. Although the plain language is not totally conclusive as to how a treaty provision should be interpreted, that language certainly is a starting point for analysis, and must be followed unless a clear intent of the parties to the contrary is positively established. See *Maximov v. United States*, 373 U.S. 49 (1963).

Sumitomo simply cannot meet its burden of establishing that the parties to the Treaty did not intend what the Treaty plainly

states. The most scholarly analysis of the record of the Treaty negotiations is found in the dissent by Judge Reavley in *Spiess v. C. Itoh & Co. America, Inc., supra*, 643 F.2d at 363-372 (Pet. App. 80a-97a). The *Spiess* court considered the same treaty issue now before this Court. Judge Reavley thoroughly analyzed the definitions, terms, structure, and secondary interpretive sources of the Treaty. Respondents submit that Judge Reavley's analysis is correct and respectfully urge the Court to adopt the conclusions of that opinion.[8]

Judge Reavley points out that Article XXII(3) of the Treaty states that a corporation has the citizenship of its place of incorporation. He also shows that the Treaty drafters used the terms "companies of either party" and "enterprises controlled by nationals and companies of [Japan]" with particularity and that these terms are not interchangeable. Rather, the terms were carefully chosen to give specific and distinct rights as between companies of each party and their subsidiaries operating in a host country. Under Judge Reavley's analysis, Article VII(1) grants companies of either party the right to control their subsidiaries in the territories of the other party, but does not grant subsidiaries the right to invoke the "of their choice" provision of Article VIII(1). As Judge Reavley points out, it is reasonable to believe that the Treaty negotiators would "reserve the most extraordinary degree of treaty protection only for business enterprises created under their own laws, and would allow enterprises created under the laws of the other party to be subject to those laws on a basis equal to all other companies of that party." 643 F.2d at 369 (Pet. App. 92a).

Judge Reavley also discusses and interprets two communications signed by former Secretaries of State Acheson and Kissinger. 643 F.2d at 369-371 (Pet. App. 93a-97a). The Acheson

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[8] Judge Reavley's dissent has been adopted by other courts as the definitive analysis on the issue of whether a domestic corporation may invoke the "of their choice" provision of the FCN. See *Porto v. Canon, U.S.A. Inc.*, No. 81 C 1305, N.D. Ill. (Sept. 9, 1981); *Mattison v. Canon, U.S.A., Inc.*, No. 81 C. 1304, N.D. Ill. (Oct. 1, 1981). These opinions appear as appendices to the Supplemental Brief in Support of the Petition for a Writ of *Certiorari*, at 1a-12a, 13a-16a.

communication (State Department Airgram A-49 to the American Embassy, Tokyo, dated July 23, 1952 [App. 145a-151a]) responded to an inquiry as to what would happen if citizens of a third country, which had not entered into an FCN with Japan, sought to gain treaty advantages by incorporating in the United States and then claiming privileges under the FCN. The airgram states at the outset:

> . . . Article XXII, paragraph 3 . . . establishes that whether or not a juridical entity is a "company" of either party, for treaty purposes, is determined solely by the place of incorporation. Such factors as the location of the principal place of business or the nationality of the major stockholders are disregarded (App. 145a-146a).

Secretary Acheson then points out that a specific Treaty section (Article XXI(1)(e)) was designed to allow each party "to protect itself against such an eventuality" by piercing "the corporate veil" if this situation were to arise. The Acheson airgram, therefore, establishes that the general rule as to corporate nationality can only be altered by specific language in a Treaty article.

The purpose of the Kissinger communication (State Department Airgram A-105 to the American Embassy, Tokyo, dated January 9, 1976 [App. 157a-159a]) was to give direction to Embassy officials seeking to convince Japanese officials that they should grant treaty trader status to two Americans seeking to work for a United States citizen owned business incorporated in Japan. As Judge Reavley stated:

> Secretary Kissinger was arguing against two extreme views, the Japanese government's view that the American-owned company incorporated in Japan had *no* rights under the Treaty, and the embassy view that an American-controlled Japanese company was still a company of the United States. Speaking to the Japanese government's view, Secretary Kissinger states that the definition of "company" in article XXII(3) does not deny rights under the Treaty. Of course it is

> quite accurate to say that a definition does not create or deny substantive rights, but it inherently limits the *scope* of rights conferred in other, substantive sections of the Treaty. Rejecting the extreme positions taken by the Government of Japan and the American embassy, Secretary Kissinger chose the middle view that conforms with the plain meaning of article XXII(3): an American- owned company incorporated in Japan is a "company of Japan" but still has the specific rights expressly granted to controlled enterprises by other sections of the Treaty, most notably the article VII(1) grant of national subsidiary treatment. 643 F.2d at 370-371 (Pet. App. 95a).

The logic of the *Spiess* dissent is now strengthened by the opinion of the State Department that Article VIII(1) of the Treaty was not intended to cover locally incorporated subsidiaries. This State Department opinion was promulgated eleven months after the Department had announced an earlier, ambivalent position in the Marks letter (App. 94a-97a),[9] a document heavily relied upon by Sumitomo. The Department justified its changed view by pointing out that subsequent to the Marks letter it had "conducted an extensive review of the negotiating files on our bilateral treaties of friendship, commerce and navigation (FCN), including the 1953 FCN with Japan, and has carefully weighed the question of coverage of subsidiaries by this treaty. . ." (App. 307a). The State Department concluded:

> On further reflection on the scope of the application of the first sentence of paragraph 1 of Article VIII of the U.S.-Japan FCN, we have established to our satisfaction that it was not the intent of the negotiators to cover locally incorporated subsidiaries and that there-

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[9] According to Mr. Marks, Sumitomo could invoke the "of their choice" provision, but nonetheless could not discriminate. He stated, "we do not believe that [the provision] confers any right to discriminate against a particular sex, religious or minority group." Marks referred to the "OECD Guidelines," discussed *infra*, as supportive of the State Department "view that Article VIII should not be read as conferring a license to discriminate" (App. 95a).

> fore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty. In terms of selection of personnel, management or otherwise, the rights of such subsidiaries are determined by the general provisions of Article VII(1) and (4), which respectively provide for national and most favored nation treatment of such subsidiaries (App. 307a-308a).

The Department's interpretation of the Treaty is to be afforded great deference. *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Factor v. Laubenheimer*, 290 U.S. 276, 295 (1933). This position was in fact officially conveyed to the Government of Denmark, which was concerned about State Department interpretations of similar clauses in the friendship treaty between it and the United States (App. 322a-323a).

The State Department position is consistent with the Treaty negotiating documents which have been released to the parties in both this case and the *Spiess* matter.[10] Respondents again rely upon the excellent analysis of these documents by Judge Reavley (App. 93a-97a). However, respondents will comment on one of these documents which has been misinterpreted by the petitioner in its brief.

Petitioner erroneously relies on a letter from Herman Walker, Jr., of the State Department, dated October 28, 1955, to the counselor for Economic Affairs, American Embassy in The Netherlands (App. 287-291A) to support its position that a domestic subsidiary obtains all the substantive rights of its foreign parent under an FCN Treaty, regardless of whether such rights are afforded to a controlled enterprise or subsidiary under the specific provisions of the Treaty. See Pet. Br., 37-38.

The Walker letter dealt with proposed language to be added to the United States-Dutch FCN Treaty, 1956, 8 U.S.T. 2043,

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[10] The State Department's determinations are consistent with the conclusion reached by the National Labor Relations Board when the NLRB ruled that an American subsidiary of a foreign corporation should not be allowed to pierce its own corporate veil to exempt itself from American labor laws. *S.K. Products Corp.*, 230 N.L.R.B. 1211 (1977).

T.I.A.S. No. 3942 provision comparable to Article XXII(3) of the United States-Japanese Treaty. The Dutch had proposed a revision regarding a company's nationality which would have given a subsidiary all the rights of the foreign parent (App. 295a). They were concerned with the problem of local laws in the United States limiting the rights of aliens to acquire and own real property. See App. 278a-79a, 281a, 292a-94a. The United States refused to accept the across-the-board proviso sought by the Dutch and on September 16, 1955 Mr. Walker wrote the United States Embassy in The Netherlands:

> When this matter of providing that a controlled-company enjoys parent-company rights first arose in connection with real property, it could be confidently visualized that the principle was acceptable, because the mind could be focused on one mensurate problem. But, then, when last March it was proposed to extend this proposition to the whole Treaty, reservation became appropriate (App. 282a).

Mr. Walker also noted certain problems that might arise by an across-the-board proviso granting subsidiaries rights equal to those of foreign companies.

Following the September 16, 1955 Walker letter, the Dutch resubmitted their proposal in an altered form (App. 295a). The October 28, 1955 letter was a response to that proposal. The essence of the Walker letter is that the United States and the Dutch were in agreement that controlled companies or subsidiaries are "equated to domestic companies under the treaty or under legislation—a proposition which, as stated, does not run afoul of the Department's unwillingness to extend the limits" of the article dealing with real property (App. 287a). The "floor" which Mr. Walker writes about (Pet. Br. 37) guarantees domestic subsidiaries of foreign corporations national treatment, except where real property ownership may be involved. The "floor" does not relate to the treatment which may be accorded to the foreign parent under specific treaty sections. In fact, Walker's October 28, 1955 letter concludes that there "is no precedent whatsoever for the content and framing of a broad rule regarding the rights generally of 'controlled companies'..." (App. 291a).

The result of the Dutch-American negotiations was a rejection of the broad subsidiary rights principle. Instead, the parties added specific language to the real property Article, which is not in the United States-Japan Treaty, giving subsidiaries of Dutch companies additional rights only with regard to real property ownership. 8 U.S.T. at 2058-9. Petitioner has taken Mr. Walker's "floor and not a ceiling" statement out of context in an attempt to support its position before this Court.

Recently Released State Department Documents

On November 30, 1981, the State Department, with the approval of the Solicitor General, released certain additional documents dealing with the FCNs to counsel in this case.[11] Several of these documents shed additional light on whether the parties intended subsidiaries incorporated in the host country to be covered by Article VIII(1).

One of these documents is an airgram from the State Department to the United States Embassy in Japan concerning possible expropriations of properties of the other party—an issue covered by Article VI (State Department Airgram A-22, May 7, 1952). The airgram was sent at the time of the negotiations and considered the scope of the term "nationals and companies" as used in Article VI. Article VI prevents either government from singling out property owned by entities of the other for expropriation.[12] The airgram indicates that the term "nationals and companies" was believed insufficient to protect the property of a subsidiary incorporated under the laws of the other party. Thus, special clarifying language was inserted to insure that a

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[11] Those documents which directly discuss the United States-Japan FCN have been lodged with this Court, with the approval of the Clerk.

[12] The discussion in Airgram A-22 refers to a paragraph 5 of Article VI. The original draft included a different paragraph 4 which was transposed to a different part of the Treaty. Paragraph 5 was renumbered as paragraph 4. See, Airgram A-22, p. 3.

subsidiary would be protected.[13] The airgram states why additional language was necessary:

> The object of the Department's proposed wording is to go beyond the *direct* protection of American nationals and companies, already afforded, by establishing a rule regarding the enterprises in which they have an important interest, such enterprises being considered juridically distinct from such nationals and companies. It will be noted that these enterprises as such are not put under the rule of paragraph 3, which paragraphs (sic) would be applicable only as to the property interests which American (or, mutatis mutandis, Japanese) nationals and companies held therein. Airgram A-22, 3-4 (emphasis in original).

It is highly unlikely that in a treaty so carefully drafted the parent and subsidiary would be "juridically distinct" under Article VI(4), yet juridically identical under Article VIII(1). The State Department clearly recognized that "nationals and companies" did not include subsidiaries, and that specific language was needed to grant coverage to subsidiaries in those situations where coverage was desired, such as under Article VI.[14]

Three of the recently released documents reveal that the Ministry of Foreign Affairs of Japan ("MOFA") agrees with the State Department that American subsidiaries of Japanese corpo-

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[13] Article VI(4) reads as follows:

> Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 3 of the present Article. Moreover, *enterprises in which nationals and companies of either Party have a substantial interest* shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control (emphasis added).

[14] Even without the benefit of airgram A-22, Judge Reavley recognized the significance of the inclusion of specific and additional language in certain articles, such as VI(4), granting explicit rights to controlled enterprises or subsidiaries. 643 F.2d at 366-67 (Pet. App. 86a-87a).

rations may not invoke Article VIII(1). The first of these documents is a Foreign Service Inspector's Memorandum, dated November 1975, which was prepared during an evaluation of the consular offices in Japan.[15] The document discusses the issuance of treaty trader visas, points out that the Japanese were more restrictive in their interpretation of the FCN for purposes of issuing visas, and states:

> MOFA [the Ministry of Foreign Affairs] also indicates that a company incorporated in Japan or an individual doing business as a sole proprietor is a Japanese company and therefore excluded from treaty benefits, even though wholly-American-owned (p. 3).

Two additional telegrams from the American Embassy in Tokyo to the Secretary of State confirm that the Foreign Ministry of Japan still maintains the position that domestic subsidiaries cannot invoke Article VIII(1). The first telegram,[16] sent in August 1979, refers specifically to the instant case and to the 1978 letter of Deputy Legal Adviser Marks. After pointing out that the district court had denied a motion to dismiss respondents' complaint, the telegram states:

> Sumitomo Japan is seeking support from the Foreign Ministry which has denied it so far because the Ministry considers companies, like Sumitomo Shoji America, Inc., incorporated under U.S. law to be U.S. companies not entitled to the protection of the Japanese government.

The Embassy sought guidance from the State Department.

The second telegram, sent in September 1979,[17] indicates that the Embassy had attempted to convince the Foreign Ministry to modify its position. The Foreign Ministry, however, did not

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[15] The document is captioned, Department of State, The Conduct of Relations with Japan, Inspector's Memorandum No. 3.

[16] This telegram, which is two pages long, is numbered R030643Z Aug. 79. The subject is stated as "Foreign Ministry Interest in Discrimination Case, Lisa M. Avigliano, *et al* . . ."

[17] This telegram, which is two pages long, is numbered R100925Z Sep. 79.

change its position. MOFA pointed out that its immigration authorities in 1975 refused to issue a visa to an American citizen because the Japanese government "did not recognize the subsidiary as a U.S. company entitled to the rights and privileges defined in the FCN Treaty."[18]

Thus, the recently released documents show that the Japanese government adheres to the view that a domestic subsidiary cannot invoke the "of their choice" language of Article VIII(1).[19] This view is consistent with the position of the State Department, as well as the plain language of the Treaty and the intent of the Treaty negotiators.

II

SUMITOMO'S PRACTICE OF DISCRIMINATING IN FAVOR OF JAPANESE NATIONALS CONSTITUTES DISCRIMINATION IN VIOLATION OF TITLE VII.

Prior to the grant of *certiorari* in this case, Sumitomo argued that the Treaty "exempt[ed] Japanese trading companies and their wholly owned subsidiaries incorporated in the United States from the application of Title VII" (Pet. App. 3a). Sumi-

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[18] The telegram further indicates that the Japanese government did not concede this principle or grant a treaty trader visa to the individual, although it did permit this particular U.S. citizen to enter Japan on other grounds.

[19] Respondents note that the Ministry of International Trade & Industry of the Government of Japan has filed an *amicus curiae* brief in support of Sumitomo. This brief, however, makes no attempt to analyze the Treaty provisions or its negotiating history, nor does the Ministry comment upon the position which has been taken by the Ministry of Foreign Affairs of Japan, which is not only set forth in the recently released documents discussed above, but appears in a telegram released during the proceedings below. See Department of State telegram R130506Z of Aug. 1975 to American Embassy, Tokyo. The subject of this telegram is "GOJ interpretation of FCN Treaty," and the text concerns Japan's refusal to admit two Americans as treaty traders (App. 154a-155a).

tomo now admits that it is subject to Title VII and may not engage in prohibited discrimination.[20]

Sumitomo, nonetheless, advances arguments which would, if adopted, effectively immunize it from the reach of Title VII. Sumitomo maintains that Title VII allows it to discriminate on the basis of citizenship and impose a policy of hiring only Japanese "nationals" in executive, supervisory, specialist and sales positions. The petitioner asserts this as an absolute principle, making any factual determinations regarding the purpose or effect of that policy unnecessary.

Sumitomo relies on this Court's holding in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973) to claim that it may implement a Japanese nationals only policy. It argues that *Espinoza* upheld the right to discriminate on the basis of citizenship and therefore its exclusionary practice in favor of Japanese nationals is not in violation of Title VII. Sumitomo has, however, totally misread *Espinoza*.

Fundamental to the *Espinoza* holding was the fact that the challenged employment practice did not involve even the remote possibility of discrimination based on national origin. Mexican citizens challenged the employer's policy of hiring only United States citizens. The challenge was unsuccessful because the employer established that the bulk of its work force was comprised of persons of Mexican national origin. The challenged citizenship requirement, therefore, was not exclusionary and there was no showing of discrimination based on national origin.

The *Espinoza* case illustrates that a United States citizenship requirement is not inherently discriminatory. Americans are an

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[20] Petitioner states in its brief:

> Sumitomo makes no claim that it is "exempt" from Title VII or that is not an employer within the meaning of the Act. It concedes, for example, that it could not hire male U.S. citizens to the exclusion of female U.S. citizens. Similarly, it could not discriminate on the basis of national origin. . . . The issue therefore is not whether Title VII "applies" to Sumitomo, or to Japanese companies in general, but whether the employment practice under attack violates Title VII (p. 14).

extremely heterogenous, multinational people. Generally, therefore, an American citizenship requirement will not eliminate persons from different national origins or races from an employer's workplace. By contrast, when an American employer utilizes a foreign citizenship requirement, a strong possibility exists that the requirement will inherently restrict the ethnic and racial diversity of the work force. A Japanese citizenship requirement is bound to create an extraordinarily homogenous work force, in contrast to the heterogenous work force which would result from the non-discriminatory application of an American citizenship requirement.

Over 99% of the population of Japan is comprised of persons of Japanese ethnic origin.[21] Even though Sumitomo asserts that its policy has nothing to do with anyone's national origin, it is obvious that it has everything to do with national origin, as well as race. For Sumitomo to impose a Japanese citizenship requirement for its managerial staff is to insure that all the members of that staff will be of Japanese ethnic and racial origin. Sumitomo's asserted foreign citizenship requirement is synonymous with a national origin and/or racial exclusionary requirement.[22] Sumitomo's claim that it also excludes American citizens of Japanese

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[21] D. Whitaker, *Area Handbook for Japan* 70 (American Univ. Foreign Area Studies, 3d Ed. 1974). Of the non-Japanese residents (less than 1% of the population), 87% are ethnic Koreans. *Id.* Korean migration to Japan began in the 1920's. By World War II, approximately 2.5 million Koreans were residents of Japan, but they "were refused full citizenship." F. Chaffee, *Area Handbook for Japan* 72-73 (American Univ. Foreign Area Studies, 2d Ed. 1969). Following World War II, until the outbreak of the Korean War, almost 2 million Koreans were repatriated. The approximately 600,000 Koreans living in Japan, as of 1974, were still considered aliens, notwithstanding that they were either born in Japan or long term residents of Japan. *Id.* at 73; D. Whitaker, *supra*, at 70-71. Respondents do not know their present status.

[22] Respondents' complaint alleges jurisdiction under 42 U.S.C. § 1981, as well as Title VII. The § 1981 jurisdictional claim was stricken by the district court, despite respondents' contention that they could establish liability under this section if they could show that national origin discrimination was motivated by or indistinguishable from racial discrimination. The court rejected this contention (Pet. App. 32a). Thereafter, the court denied respondents' motion to certify this issue (Pet. App. 42a). Assuming this Court remands for trial, respondents could amend their Title VII claims to allege racial as well as national origin and sex discrimination.

origin from its managerial, supervisory and sales positions does not change the fact that the company's policy is inherently exclusionary. Sumitomo has structured a policy with the inevitable result that all of its employees, except those at the lowest levels, will be of one national origin and race.

Congress, in enacting Title VII, sought to bar employers from creating a work force comprised of people from one national origin, race or sex. To permit Sumitomo to maintain its exclusionary policy is to leave in place the very condition that Congress sought to dismantle.

Even if the national origin and racial implications of Sumitomo's stated policy were not so strikingly apparent, this Court in *Espinoza* held that a factual determination is always required to determine whether a citizenship test has the purpose or effect of discriminating in violation of Title VII.

> [A] citizenship requirement might be but one part of a wider scheme of unlawful national origin discrimination. In other cases, an employer might use a citizenship test as a pretext to disguise what is in fact national origin discrimination. *Certainly Tit. VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.* 414 U.S. at 92 (emphasis added).

At this point in the proceedings it is impossible to determine whether Sumitomo's citizenship requirement has the purpose or effect of discriminating on the basis of national origin, race or sex. The record shows that most, but not all, of the company's officials and managers, professional and sales workers, are "Oriental" males. It is unknown if all of those listed on the EEO-1 reports as "Orientals" are in fact citizens of Japan. Some employees in each of these categories are white males. None, however, is female (App. 61a-67a). Thus, with regard to the sex discrimination claim, Sumitomo's EEO-1 reports show an exclusion of women in upper level positions, a pattern which must be analyzed at a trial. Moreover, given the negative attitudes in

Japanese society toward women in managerial positions,[23] the company's asserted citizenship requirement may well be a pretext for discrimination against women.

Nonetheless, Sumitomo structures an argument to foreclose a challenge based on sex discrimination. It asserts as fact that its only "criterion of preference . . . is Japanese nationality, not sex" (Pet. Br. 17-18), and argues that respondents have a "sex-plus" rather than a sex claim.[24] Citing *Spirides v. Reinhardt*, 22 Empl. Prac. Dec. (CCH) ¶ 30,740 (D.D.C. 1980), *aff'd without op.*, 656 F.2d 900 (D.C. Cir. 1981) and *Michalas v. Reinhardt*, No. 78-0920, *slip op.* at 4 (D.D.C. May 29, 1978), *aff'd without op.*, No. 79-2007 (D.C. Cir. June 21, 1980), Sumitomo posits as an absolute principle that there can be no sex discrimination when the employer's classification is based on citizenship as there is no correlation between nationality and gender.

Neither *Spirides* nor *Michalas* support this argument. In both cases, the courts determined that there was no correlation between citizenship and sex. For example, in *Spirides*, the court pointed out that the female plaintiff was replaced by a female with greater skills. Thus, neither the purpose nor effect of the citizenship requirement under consideration constituted sex discrimination. The court stated that there was no "factual reason to suspect that the citizenship factor operates to the greater disadvantage of women than of men." 22 Empl. Prac. Dec., *supra* at 14,826. The facts in this case, however, already point to employment practices which do limit women to low level positions regardless of their citizenship.

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[23] "Women workers [in Japan] are treated only as a temporary and complementary work force and have very limited opportunities for capacity development or for promotion and upgrading." U.S. Dept. of Labor, U.S. Employment Standards Administration, U.S. Women's Bureau, Japanese Ministry of Labor, Japanese Women's and Minors' Bureau, *The Role and Status of Women Workers in the United States and Japan* 41 (1976).

[24] Sumitomo misunderstands when a sex-plus claim arises. Such a claim arises when a discrete group of a protected class is burdened by a special limitation on its ability to work, as for example when employment is denied only to those women who are mothers. See e.g., *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

III.

THE TREATY NEITHER PROHIBITS THE UNITED STATES FROM PASSING ANTI-DISCRIMINATION LAWS APPLICABLE TO JAPANESE COMPANIES AND THEIR AMERICAN SUBSIDIARIES NOR LIMITS THE MANNER BY WHICH SUCH LAWS MAY BE ENFORCED.

Respondents maintain in Point I that Sumitomo, as a domestic subsidiary, may not invoke the "of their choice" provision of Article VIII(1). Assuming, however, that Sumitomo obtains Article VIII(1) rights, these rights do not in any manner undercut the applicability of Title VII.

A. The History Of The Treaty's Enactment Establishes That It Was Not Intended To Override Civil Rights Employment Laws.

1. State Department negotiations documents

Records released by the State Department reveal that the FCN negotiators sought to override local laws prohibiting the employment of foreign nationals by foreign companies doing business in a host country. Nothing in the negotiations record, however, supports a conclusion that the negotiators intended to limit the power of a host country to prohibit discrimination in employment.

With regard to the United States-Japan FCN, the Japanese negotiators were seeking assurances that state laws that discriminated against aliens would not apply to their nationals. For example, a December 17, 1951 United States dispatch from Tokyo to the State Department emphasized that the Japanese negotiators were interested in eliminating American employment bars "merely by reason of their alienage" (App. 123a). On January 7, 1952 the State Department responded that there were various state laws in effect at the time which would adversely affect aliens seeking work in the United States and that, "to the extent that the treaty contained a national treatment provision on the professions, any contrary provisions of state law would be

ipso facto overridden, insofar as Japanese nationals were concerned" (App. 135a).

State Department documents relating to other FCNs also confirm that the major concern with respect to employment rights was to override local laws which discriminated against nationals of foreign countries. Thus, a Foreign Service dispatch relating to the German FCN stated that "its major special purpose is to preclude the imposition of 'percentile legislation'" (App. 182a). These documents indicate that the employment provisions of the Treaty were intended to eliminate discrimination, not to allow the foreign enterprise the right to discriminate in the host country.

None of the documents relied upon by the Petitioner (Pet. Br. 25) stands for the proposition that Article VIII(1) was intended to allow foreign nationals or foreign companies, let alone their American incorporated subsidiaries, to hire exclusively foreign nationals for executive and specialist positions. For example, the focus of the Note from the United States High Commissioner for Germany (App. 254a-257a) concerned the need to establish that foreign professionals would be permitted, under certain circumstances, to practice in host countries. In the Note, the United States expressed its concern that licensing and citizenship requirements could interfere with the ability of American professionals to provide needed services to American owned businesses in Germany.

Respondents agree with Sumitomo's statement that "[l]aws limiting alien employment were a particular threat to the foreign investor's control" (Pet. Br. 26).[25] However, there is no basis for Sumitomo's contention that the resolution in the FCNs to this threat was to allow foreign corporations to discriminate at will against domestic workers. Indeed, a State Department official pointed out in a 1978 letter to the EEOC that the FCN merely gave the subsidiaries of Japanese companies doing business in

[25] Apparently, this is why the State Department objected (App. 93a) to a Uruguayan FCN draft which would give the parties the right to pass "laws designed to protect employment [for their own nationals]" (App. 91a), e.g. percentile legislation.

the United States "the right to employ Japanese persons on the same basis as American nationals. . . . The [Civil Rights] Act expresses the firm policy of the United States against all forms of discrimination and the FCN Treaty's language does not compel a finding of exemption for 'treaty traders' " (App. 100a).

2. The Senate FCN hearings

The legislative history of the Senate's ratification of this and other FCNs establishes that these treaties were not intended to limit the right of either the states or the federal government to pass anti-discrimination laws. With regard to the right of companies covered by the Treaty to employ personnel of their own choice, Assistant Secretary of State Samuel C. Waugh emphasized that this right was granted, "upon as favorable terms as the nationals of the country." *Commercial Treaties, Hearings before the Subcomm. on Commercial Treaties of the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 2 (1953) ("1953 Hearings").[26]

Assistant Secretary Waugh unequivocally stated that the FCNs were not intended to abrogate federal or state laws:

> In the current series of treaties of the type now before you it has not been the intent to introduce any new provisions that would be at variance with State or Federal laws . . . 1953 Hearings at 3.

Waugh had previously mentioned that the FCNs might affect state legislation restricting certain professions to citizens in "relatively minor respects." In response to this remark, Senator Hickenlooper sought and obtained assurances that the Treaty would not apply to professions involving public health and safety (1953 Hearings 3). Thus, the State Department was fully aware of the impact state laws could have upon both citizens and aliens. It is significant that at no time did the State

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[26] *Amicus curiae*, East Asiatic Co. Ltd. *et al.*, in its brief, has edited Assistant Secretary Waugh's testimony so as to totally distort the meaning and intent of his presentation. On p. 14 of its brief, the East Asiatic Co. quotes Mr. Waugh with regard to his comments that investors wanted assurances that they could employ personnel of their own choice, yet deletes the modifying clause that this right was sought "upon as favorable terms as the nationals of the country."

Department representative indicate that the FCNs would repeal or modify state anti-discrimination laws. At the time of the hearings, several states prohibited employment discrimination based upon race, creed, color or national origin. See e.g. Law Against Discrimination, N.J. Stat. Ann. Tit. 10, § 5-4 (West 1976), (law became effective 1945); New York Executive Law § 296 (a) (McKinney Supp. 1980) (first enacted in 1951).[27]

The intent of the American negotiators to leave state laws intact was given special emphasis at the hearings. At the conclusion of Mr. Waugh's testimony, Senator Hickenlooper asked Vernon G. Setser, the State Department's Chief of the Economic Treaties Branch Commercial Policy Staff:

> Is it the intent of the Department or the administration, in negotiating these treaties, either to enlarge the authority of the Federal Government for legislation within the States, or to curtail or restrict the authority of the States themselves in any matter where they have formerly had authority?

The State Department representative answered:

> No, sir. . . . 1953 Hearings at 4.

This answer was consistent with the State Department's position at the 1952 FCN hearings:

> In undertaking treaty commitments that would formally confirm to foreigners a substantial body of rights in the United States, the Department of State has exercised great care to frame provisions that would be in conformity with Federal law. . . . Furthermore, where the subject matter covers fields in which the States have a paramount interest, such as the formation and regulation of corporations and the ownership of property, the treaty provisions have been worked out with the same careful regard for the States' prerog-

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[27] Since 1938, the Constitution of New York, the state in which Sumitomo chose to incorporate, has prohibited discrimination by any employer. N.Y. Const. Art. I § XI (McKinney 1969).

atives and policies that has traditionally characterized agreements of this type.[28]

In this regard this Court has held that, wherever possible, a treaty should be construed to avoid conflicting with or overruling state laws. *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 143 (1938); *United States v. Pink*, 315 U.S. 203, 230 (1940).

In light of the legislative history, as well as this Court's rulings in *Guaranty Trust* and *Pink*, approval of the FCNs did not deprive the states of the right to enforce anti-discrimination laws asgainst employers asserting treaty rights. *A fortiori*, the federal government retained the right to pass its own anti-discrimination laws, and these laws cannot be deemed in conflict with the Treaty provisions.

3. The Treaty signatories anticipated enactment of civil rights legislation in the future

In addition to the fact that local anti-discrimination laws were in effect when the Treaty was negotiated and approved, both governments clearly understood that the other party might enact legislation barring employment discrimination. The Treaty itself makes clear in Article I that while treaty traders would be permitted to enter the territory of the other party, the host country preserved "the right . . . to apply measures that are necessary to maintain public order and protect the public health, morals and safety." The 1964 Civil Rights Act is a public health, safety and morals statute.

Moreover, at the time the Treaty was approved, the United States was a member of the United Nations, and Japan had officially declared its intention to apply for membership.[29] United Nations members pledge themselves to "take joint and separate

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[28] *Commercial Treaties, Hearings before the Subcomm. on Commercial Treaties of the Senate Comm. on Foreign Relations*, 82d Cong., 2d Sess. 6 (1952).

[29] Japan stated its intention to join the U.N. in the preamble to the Treaty of Peace between the United States and Japan, 1951, 3 U.S.T. 3169, T.I.A.S. 2490. Japan was admitted to the U.N. on December 12, 1956 by General Assembly Resolution 113 (XI).

action" for the achievement of "universal respect for and observance of human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion."[30]

Additionally, the Organization for Economic Cooperation and Development ("O.E.C.D."), the multi-lateral signatories of which include both the United States and Japan, issued Guidelines for Multinational Enterprises which provide that:

> Enterprises should, within the framework of law, regulations, and prevailing labor relations and employment practices, in each of the countries in which they operate . . . (7) implement their employment policies, including hiring, discharge, pay, promotions and training without discrimination unless selectivity in respect of employee characteristics is in furtherance of established governmental policies which specifically promote greater equality of employment opportunities. . .[31]

Clearly the Japanese and United States governments recognized their respective right and international obligation to pass civil rights laws which would be binding upon companies of the other.

4. Congress did not exempt FCN companies from Title VII coverage

It is significant that Title VII contains no exemption from coverage for employers covered by the FCN or other treaties even though Congress wrote numerous exemptions in the original statute and its amendments.[32] Title VII, in fact, contains two

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[30] U.N. Charter art. 55, 56.

[31] O.E.C.D. Guidelines for Multinational Enterprises, Chapter on Industrial Relations (June 21, 1976), *reprinted in* 1976 *Digest of United States Practice in International Law* 524.

[32] The law exempts employers with fewer than 15 employees, 42 U.S.C. § 2000e(b); labor organizations with fewer than 15 members, 42 U.S.C. § 2000e(e)(B); acts done to aliens outside the U.S., 42 U.S.C. § 2000e-1; religious schools, 42 U.S.C. § 2000e-2(e); Communists, 42 U.S.C. § 2000e-2(f); bona fide seniority or merit systems, 42 U.S.C. § 2000(e)-2(h); preferential treatment of Indians, 42 U.S.C. § 2000(e)-2(i); statutorily created veterans preferences, 42 U.S.C. § 2000e-11.

exemptions which specifically relate to employment situations with international implications—the exemptions for matters involving national security, 42 U.S.C. § 2000e-2(g), and for aliens outside any state, 42 U.S.C. § 2000e-1. Clearly, Congress has provided express exemptions when it believed they were necessary.

5. Commentators' views on FCNs

Herman Walker, who both parties agree played a leading role in formulating post World War II FCNs, stated that the purpose of these treaties was to place foreign corporations on an equal footing with domestic companies, and not in a preferred position, while recognizing that all companies would operate within the framework of local law. Mr. Walker stated:

> These considerations [of fitting the provisions of the Treaty into "the known fabric of United States law" and the known law of the other party to the Treaty] have led to the extensive use of so-called contingent standards as the cornerstone of rule-making. A contingent standard is, as its name implies, one that defines the treatment provided in relative terms. The specific content of the treatment, at any given point of time, and in connection with any given subject, is determinable not from a reading of the Treaty itself, but by reference to an exterior state of law and fact. The objective is to secure non-discrimination, or equality of treatment: a sort of "equal protection of the laws" objective. Walker, *Modern Treaties of Friendship, Commerce & Navigation*, 42 Minn. L. Rev. 805, 810-811 (1958).

Other American scholars have agreed with Walker. See Steiner & Vagts, *Transnational Legal Problems* 37-38 (Foundation Press 1968).

A leading Japanese commentator has taken a similar position, pointing out that Japan is fully entitled to enforce its laws against foreign enterprises functioning in Japan pursuant to an FCN as long as those laws are "applicable to the Japanese as

well." Fujita, *Does Japan's Restrictions on Foreign Capital Entries Violate her Treaties?*, 3 Law in Japan 162, 172, n.29 (1969).

6. C. Itoh & Co. (America), Inc.'s view of the Treaty

Contrary to the position taken by Sumitomo, *amicus curiae* C. Itoh & Co. (America), Inc. argues that United States employment laws of whatever nature have absolutely no application to wholly owned United States subsidiaries of Japanese corporations. Relying on the majority opinion in *Spiess v. C. Itoh & Co. (America) Inc., supra*, 643 F.2d at 359, Itoh claims that "[the Treaty] grants to U.S. companies in Japan and Japanese companies in the United States the vital right to select their own management and technical personnel without interference from the host country" (Itoh Br. 22-23). If this claim were upheld, a corporation such as Sumitomo or Itoh could decide to employ an all white, male American executive staff, and discriminate openly against blacks, women, religious denominations, or any other group the corporation disfavors. Obviously the negotiators of the Treaty did not intend this result.

B. The State Department's Processing Of Visa Applicants Seeking To Enter The United States As Treaty Traders Is Not A Substitute For Title VII Enforcement Procedures.

Sumitomo contends that the State Department has sole authority to enforce Title VII with regard to the employment of treaty traders. It claims that the State Department "operates an elaborate system for screening applicants for treaty trader visas . . . [and] has broad discretion to define the criteria for issuance of the visa and to insure that the number of treaty traders is appropriately limited" (Pet. Br. 32-33). It argues that Title VII principles will be respected because United States consular officers will not issue an E-1 visa to a "clearly ineligible person" (Pet. Br. 27).

The State Department, however, has never suggested that its visa evaluation process for treaty traders should preclude en-

forcement of Title VII by the EEOC or the federal courts. To the contrary, the State Department, in the October 17, 1978 Marks letter to the EEOC, unequivocally took the position that it reviews visa requests on an individual basis only and does not study the employment policies and practices of the prospective employer. Recognizing that the State Department could not make a determination or judgment as to whether a particular employer was in violation of Title VII, Mr. Marks concluded:

> In granting a non-immigrant treaty trader visa, the Department (or INS) thus makes an administrative determination that a visa applicant will fill an "executive personnel" position, but this determination is made for the limited purpose of administering the visa laws. We do not believe that the determination should preclude judicial review of the scope of the term "executive personnel" for other purposes, including the application of Title VII (App. 96a).

Treaty traders are evaluated for entry visas pursuant to 22 C.F.R. § 41.40(a). This regulation empowers the consular officer conducting the evaluation to determine only whether the applicant will be engaged in "duties of a supervisory or executive character" and whether "he has specific qualifications that will make his services essential to the efficient operation of the employer's enterprise. . ." A July 6, 1981 State Department telegram instructs consular officers making treaty trader evaluations that they should consider such details as the salary to be earned and the level of employees the applicant will supervise.[33] Thus, nothing in the regulation itself or the interpretive telegram empowers the consular officials to conduct an overview of an employer's equal opportunity performance, or to consider how an individual visa decision will affect that performance.

Additionally, it appears that the State Department has been extraordinarily liberal in determining what positions require executive personnel and has not carefully screened prospective treaty traders. Statistics provided in the *amicus curiae* brief of

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[33] State Dept. telegram No. 089024 to Japanese Posts, ¶ 4, *reprinted in* 58 Interpreter Rel. 478, 479 (Sept. 17, 1981).

the Ministry of International Trade & Industry show that the ratio of Americans to Japanese employed directly by Japanese owned trading companies in the U.S. is 1.4 to 1 (5, n. 5). Thus, over 40% of the entire work force of these companies is Japanese. With respect to Sumitomo, its 1977 EEO-1 reveals that 28 of its 31 officials and managers are "Oriental." Twenty-five of its 35 professionals, and 37 of its 43 sales workers are also "Oriental" (App. 67a). Presumably, many, if not all, of the persons who are classified as "Oriental", entered the United States as treaty traders. These employees apparently received E-1 visa approval despite the fact that many work in job categories which are not provided for in Article VIII of the Treaty (e.g. sales workers). Furthermore, Sumitomo itself classifies many of these treaty trader employees as "managerial and supervisory," while Article VIII provides only for the admission of executives, technical experts and specialists (App. 38a-40a).

Finally, this Court and the lower federal courts have consistently held that Title VII jurisdiction is not foreclosed because another agency or forum may review the same factual situation within a different statutory or adjudicative framework. *Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974) (arbitration pursuant to collective bargaining agreement); *County of Washington v. Gunther*, ___ U.S. ___, 68 L.Ed.2d 751 (1981) (Equal Pay Act); *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125 (6th Cir. 1971) (National Labor Relations Board); *Norman v. Missouri Pacific Railroad*, 414 F.2d 73 (8th Cir. 1969) (National Mediation Board); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979) (intra-corporate remedies); *Smallwood v. National Can Co.*, 583 F.2d 419 (9th Cir. 1978) (intra-union remedies); *Smouse v. General Electric Co.*, 626 F.2d 333 (3d Cir. 1980) (State's highest court interpreting state human rights law not given *res judicata* effect); *Page v. Curtiss-Wright Corp.*, 332 F.Supp. 1060 (D.N.J. 1971) (Office of Federal Contract Compliance). Thus, even if the State Department were to consider Title VII implications as part of its visa screening procedure, this would not operate as a bar to Title VII review by the EEOC and the federal courts.

IV.

THE EXPANDED BFOQ EXCEPTION PROPOSED BY THE SECOND CIRCUIT IS TOTALLY INCONSISTENT WITH TITLE VII GOALS AND ENFORCEMENT STANDARDS.

The court below, having correctly determined that Title VII applies to Japanese companies doing business in the United States, undermined the enforcement of this decision by instructing the district court that Sumitomo was entitled to assert a broadened bfoq exception. According to the Second Circuit, this broadened exception would give "due weight to [Sumitomo's] Treaty rights and unique requirements. . . .", 638 F.2d at 559 (Pet. App. 15a). Under the Second Circuit's interpretation, the trial court must consider such factors as Japanese "cultural skills, . . . customs, and business practices, . . . familiarity with the personnel and workings of the principal or parent enterprise in Japan, and . . . acceptability to those persons with whom the company or branch does business."

According to the Second Circuit, Sumitomo need only show at trial "some evidence" of these factors to be relieved of a Title VII obligation. *Ibid.* Clearly, an exception of this breadth would reduce Title VII to a hollow shell. The petitioner itself concedes that the exception carved out by the Second Circuit is so radical that it might well lead one to "conclude that the effect on the BFOQ exception is a further argument against holding that Title VII is applicable" (Pet. Br. 41). Thus, even petitioner recognizes that the lower court's liberalized exception could have a severely negative impact on Title VII enforcement.

The Second Circuit's proposed standard simply cannot be reconciled with this Court's teaching "that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination based on sex." *Dothard v. Rawlinson, supra,* 433 U.S. at 334. The Second Circuit's ruling is also inconsistent with EEOC guidelines for use of a national origin bfoq. The guidelines state:

> The exception stated in Section 703(e) of Title VII that national origin may be a bona fide occupational

qualification shall be strictly construed. 29 C.F.R. § 1606.4.

The bfoq exception is to be narrowly construed because it constitutes a license to discriminate. An employer invoking this exception has made a determination that employment discrimination is essential for business reasons. If the federal courts were to liberally grant such license, widespread employment discrimination would never be eradicated.

When the Senate debated the bfoq provision, Senator McClellan sought a broad provision which would have given an employer the right to hire an individual "of a particular race, color, religion, sex, or national origin" if the hiring of that individual would be "more beneficial to the normal operation of the particular business or enterprise involved or to the good will thereof than the hiring of an individual without consideration of his race, color, religion, sex, or national origin. . ." Senator McClellan also proposed that an employer could reject a person in a protected class if it would be in the best interest of his business to do so. 110 Cong. Rec. 13,825 (1964). In response, Senator Case, a sponsor and floor manager of Title VII, pointed out that such an amendment would destroy the effectiveness of the Act. *Ibid.* The Senate's ultimate rejection of the McClellan amendment supports the EEOC position that a bfoq exception should be granted only under extremely limited circumstances, and that customer attitudes and preferences do not constitute appropriate circumstances.[34]

Underlying the Second Circuit's expanded bfoq guidelines is the notion that recognition must be given to the prejudices of Japanese businessmen, both in the United States and Japan, against dealing with either non-Japanese or female personnel. In effect, the Second Circuit gives co-worker, customer or client prejudices legitimacy merely because such prejudices are as-

[34] Customer preference is not even mentioned as a possible bfoq exception in the EEOC national origin guidelines. In the sex discrimination guidelines, EEOC indicates that customer preference can come into play only where necessary for the purpose of "authenticity or genuineness," as where an employer needs to employ an actor or actress. 29 C.F.R. § 1604.2(a)(iii) and (a)(2).

serted by foreign nationals—the precise approach espoused by Senator McClellan and rejected by the Senate. Moreover, the Second Circuit entirely overlooked the sex discrimination aspect of this case when it articulated what it determined to be appropriate bfoq factors. If, for example, a court were to accept Japanese customs with regard to the employment of women in executive capacities, females would be effectively barred from holding such positions. See *The Role and Status of Women Workers in the United States and Japan, supra,* at 41.

Respondents suggest that the reasoning employed by the Ninth Circuit in *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981) should be adopted. In that case, the employer claimed that the aggrieved female plaintiff would be unacceptable to the company's Latin American customers if she were promoted to a particular executive position, as she would be functioning in a manner inconsistent with the "proper" sex roles expected by male Latin American customers. The Ninth Circuit rejected this contention, ruling:

> [S]tereotypic impressions of male and female roles do not qualify gender as a bfoq . . . Nor does stereotyped customer preference justify a sexually discriminatory practice. *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.), *cert. den.*, 404 U.S. 950 (1971). Furthermore, the Equal Employment Opportunity Commission has held that the need to accommodate racially discriminatory policies of other nations cannot be the basis of a valid bfoq exception. EEOC Decision No. 72-0697, CCH EEOC Decision 1971, ¶ 6317 at 4569.
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> * * * * * *
>
> Wynn attempts to distinguish *Diaz* by asserting that a separate rule applies in international contexts. Such a distinction is unfounded. Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign

> nation can compel the nonenforcement of Title VII here. 653 F.2d at 1276-1277.[35]

The rationale of *Wynn* is sound. The biases of foreigners, whether from South Africa, the Middle East, Latin America or Japan simply cannot be used to block elimination of employment discrimination in the United States, a goal which was given the highest priority by Congress when it enacted Title VII. *Christiansberg Garment Co. v. EEOC*, 434 U.S. 412 (1978). Acceptance of a relaxed bfoq exception for foreign corporations and their domestic subsidiaries would create a totally inappropriate double standard. Adherence to the appropriate narrow bfoq exception does not mean that a company such as Sumitomo, doing business with a parent corporation abroad, is foreclosed from using objective job specifications and requirements for particular positions. Some of these positions may well require knowledge of the Japanese language, products, markets or business practices.[36] Of course, women as well as persons not of Japanese origin, may meet these requirements. Customer preferences, customs and other subjective criteria reflecting prohibited biases, however, simply cannot be tolerated.

This Court has held that Title VII's "focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class." *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978). The attempt of the court below to accommodate Sumitomo's "class" prejudices is antithetical to the goal of protecting individual rights and must be rejected.

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[35] See also *In Re American Jewish Congress v. Carter*, 19 Misc.2d 205, 190 N.Y.S.2d 218 (Sup. Ct. N.Y. Cty. 1959), *modified* 10 A.D.2d 833, 199 N.Y.S.2d 157 (1st Dept. 1960), *aff'd* 9 N.Y.2d 223, 173 N.E.2d 778 (1961).

[36] *Amicus curiae* Japan External Trade Organization ("JETRO") argues that U.S. based firms which hire more than a small percentage (2.5%) of Japanese do so "only during the initial phase of their American existence. . . ." According to JETRO, "Japanese personnel are concentrated in second-level managerial positions, where they provide assistance to top management on matters of finance, production and technology; other such personnel are sent from the parent company on a temporary basis, for example, to give technical advice during busy seasons or under other special circumstances" (Br. 11). Obviously, this description is inapplicable to Sumitomo.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit denying the motion to dismiss should be affirmed. The rulings of the court below that petitioner is entitled to rights under Article VIII(1) of the Treaty and to an expanded bfoq should be reversed. This case should be remanded for further proceedings.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner and Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER AND CROSS-RESPONDENT

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April 19, 1982

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IN THE

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OCTOBER TERM, 1981

No. 80-2070
No. 81-24

SUMITOMO SHOJI AMERICA, INC.,

Petitioner and Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER AND CROSS-RESPONDENT

I. SUMITOMO, AS A WHOLLY-OWNED SUBSIDIARY OF ITS JAPANESE PARENT, IS ENTITLED TO INVOKE THE EMPLOYMENT RIGHT GRANTED IN ARTICLE VIII(1) OF THE TREATY.

Respondents contend that, because Sumitomo is organized under the laws of New York, it is not a company of Japan and thus is not covered by Article VIII(1) of the Treaty, even though it is a wholly-owned subsidiary of a Japanese company. A complete answer to this contention is given in an August, 1979 telegram from the Department of State to the American Embassy in Tokyo:

> DEPARTMENT REITERATED . . . VIEW SET FORTH IN MARKS LETTER THAT FCN COVERS INVESTMENT THROUGH HOST COUNTRY-INCORPORATED SUBSIDIARIES AS WELL AS OTHER FORMS. . . . EXCLUSION OF INVESTMENT THROUGH LOCALLY-INCORPORATED SUBSIDIARIES [from Article VIII(1) coverage] WOULD GUT JAPANESE FCN OF MOST OF ITS VALUE IN INVESTMENT AREA, WITH ADVERSE IMPLICATIONS FOR ALL OUR OTHER FCN'S WHICH EMPLOY SIMILAR STRUCTURE AND TERMINOLOGY.

Dep't of State Telegram No. 227464 to U.S. Embassy, Tokyo, ¶ 2, Aug. 29, 1979.[1] This document, unusually direct and unequivocal for diplomatic correspondence, accurately states Sumitomo's position. It was not previously cited to this Court because it was not released by the Department until March 11, 1982, after all the principal briefs in this case had been filed, the last of the official documents to be dribbled out by the Department over the long course of this litigation.[2]

On this issue, the great bulk of both respondents' and the government's briefs is devoted to the proposition that Sumitomo is not a company of Japan as defined in the Treaty. The argument consists chiefly of minute textual exegesis of State Department telegrams and instructions, shards of testimony before congressional committees, and comments of Herman Walker, the moving spirit of the FCN treaty program. As our principal brief shows, the same texts can be adduced, and more persuasively we submit, to support Sumitomo's position. Pet.

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1 The telegram and the covering letter of the Department of State releasing it are reproduced and reprinted in full in Appendix A, *infra*, at p. 1a.

2 Appendix B, *infra*, at p. 9a, contains a chronology of the State Department's selective release from its archives of documents relating to the negotiating history of the Treaty. Interestingly, the message from Tokyo to which the above-quoted telegram from the Department responded and another answering message from Tokyo were released by the Department on November 30, 1981, and are relied on by the respondents in their brief in this case. Res. Br. at 15.

Br. at 35-41.[3] In truth, however, although this material throws light on the context and general orientation of the FCN treaty program, none of the negotiating documentation is addressed to the precise question before the Court: may a domestic subsidiary of a foreign investor invoke Article VIII(1) rights?

On that question, the whole elaborate textual analysis in the respondents' and government's briefs is simply beside the point. It is beside the point because Sumitomo is entitled to the benefit of Article VIII(1) *whether or not it is a company of Japan*. *See* Pet. Br. at 40-41.

1. If Sumitomo is regarded as a company of Japan within the meaning of Article VIII(1), then, as all agree, it is the right-holder by direct operation of the language of the Article.[4]

2. But even if Sumitomo is not so regarded, its parent, Sumitomo Shoji Kabushiki Kaisha, is undeniably a company of Japan. As such it is entitled under the Treaty to engage executive and specialist personnel of its choice to manage and control its investment. To make the parent's right effective, Sumitomo, the subsidiary, must be permitted to invoke it defensively in cases like the present, charging that an employment practice insulated by the Treaty is in violation of domestic laws. The principle that a party with standing may assert the rights of a third party where that is essential to make those rights effective is a familiar one. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940). It has been recognized even in the sensitive field of constitutional adjudication. *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976); *see* Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423 (1974).

Careful analysis of the opinion below reveals that it relies on both of the above theories as alternative bases of decision.

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3 Briefs and Appendices filed in this Court are referred to as follows:

Brief for Petitioner and Cross-Respondent	Pet. Br.
Brief for Respondents and Cross-Petitioners	Res. Br.
Brief for the United States as *Amicus Curiae*	U.S. Br.
Appendices to the Petition for a Writ of Certiorari	Pet. App. __a.
Joint Appendix	App. __a.

4 That a subsidiary is a company of Japan for purposes of Article VIII(1) does not necessarily imply that it will be so regarded with respect to all other treaty provisions.

Adopting the first rationale above (the piercing-the-veil approach), it says:

> Since Sumitomo is a wholly-owned subsidiary of a Japanese corporation, it is properly classified as a Japanese company for the purpose of invoking . . . Article VIII.

638 F.2d at 557-58, Pet. App. at 11a-12a. Earlier in the opinion, speaking to the second rationale above (the parent's-right approach), the court said:

> [T]he Treaty's provisions may be invoked by a wholly-owned Japanese subsidiary incorporated in the United States to the same extent that they may be availed of by Japanese corporations or firms operating in the United States. To hold that the Japanese business enterprise forfeits its rights under the Treaty merely because it chooses to function through a wholly-owned locally-incorporated subsidiary would in our view disregard substance for form . . . .

Id. at 555-56, Pet. App. at 7a-8a. *See also Bulova Watch Co. v. K. Hattori & Co.*, 508 F. Supp. 1322, 1335 (E.D.N.Y. 1981) (Weinstein, C.J.: "A New York subsidiary of a Japanese parent could . . . invoke whatever rights its parent had under applicable Japanese-American treaties . . . ," citing the opinion below).

Indeed, from the government's brief in this Court it appears that the United States itself is by no means prepared to reject the parent's-right rationale. It acknowledges that,

> as a wholly Japanese-owned trading company, Sumitomo may continue to obtain the services of Japanese nationals, to the extent they qualify for treaty trader visas under the standards described above, even if the Court concludes that Sumitomo is not a company of Japan that may invoke the special employment privilege in Article VIII(1) of the Treaty.

U.S. Br. at 6. And again:

> [B]ecause Sumitomo's parent corporation apparently is a company of Japan, the parent might well have discretion protected by the Treaty to select Japanese nationals for

> certain top-level managerial positions in Sumitomo through the exercise of the parent's right under Article VIII(1) to engage "executive personnel" of its choice in the United States to the extent necessary to effectuate its right under Article VII(1) to "control and manage" Sumitomo.

Id. at 21-22; *see also id.* at 22 n.12.

The convergence of the two rationales and the Second Circuit's indifference as between them stem from an explicit recognition that the overriding purpose of the Treaty is to protect and promote foreign investment. Thus, the court concluded that respondents' reading "would overlook the purpose of the Treaty, which was not to protect foreign investments through branches, but rather to protect foreign investments generally." 638 F.2d at 556, Pet. App. at 8a. For the Fifth Circuit, also, respondents' interpretation "would create an unreasonable distinction between treatment of American subsidiaries of Japanese corporations on the one hand, and branches of Japanese corporations on the other." *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353, 358 (5th Cir. 1981), Pet. App. at 71a.

What is entirely missing from respondents' lengthy textual analysis is the suggestion of any plausible reason why U.S. negotiators would have sought to distinguish between employment rights with respect to U.S. branch operations abroad and U.S. foreign investment carried out through locally incorporated subsidiaries. Respondents assert that "the terms were carefully chosen to give specific and distinct rights as between companies of each party and their subsidiaries operating in a host country." Res. Br. at 8.[5] The government says that "to the

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5 The suggestion that the Treaty employs a carefully worked out dichotomy between companies of a Party and subsidiaries is unwarranted. In fact, the Treaty never uses the word "subsidiaries." In addition to "companies of a party," the Treaty uses a wide variety of terms to refer to the entities it covers: "an enterprise in which [nationals of a Party] have invested . . . a substantial amount of capital," Art. I(1); "enterprises which [nationals and companies of the other Party] have established," Art. V(1); "enterprises in which nationals and companies of [the other] Party have a substantial interest," Art. VI(4); "enterprises which [nationals and companies] control," Art. VII(1); "enterprises . . . which are owned or controlled by nationals

extent that there are differences in treatment depending on the place of incorporation, *there is every reason to believe* that the Parties intended precisely that result." U.S. Br. at 15 (emphasis added). And Judge Reavley's dissent finds it "*very reasonable* that the two nations would reserve the most extraordinary degree of Treaty protection only for business enterprises created under their own laws . . . ." *Spiess v. C. Itoh, supra*, 643 F.2d at 369, Pet. App. at 92a (emphasis added). But the reasons supporting these "reasonable" beliefs are never identified.

This failure to offer a concrete reason in support of a distinction in the employment right as between branches and subsidiaries is easily explained. There is no such reason. On the contrary, all the policy considerations that animated the American negotiators argue for rights of control and management that are equal as between branches and subsidiaries. At least since World War II, American direct investment abroad has overwhelmingly taken the form of locally incorporated subsidiaries. It was to accommodate this preference that Herman Walker and his colleagues in the State Department designed the new post-war version of the FCN Treaty.

> [I]nvestors choose to operate abroad not only through branches of corporations of their own country, but also very frequently through subsidiaries chartered under the laws of the foreign country where operations are conducted. Systematic treatment, therefore, required the introduction of provisions to cover this situation, a step representing something of a departure from traditional treaty concepts. Normally and classically, a country extends diplomatic protection abroad for objects which are, and because they are, juridically identified with it—e.g., for individuals who are its nationals, for entities which owe their existence to its laws, for ships which fly its flag. Here however, treaty protection is gained for entities not so identified; the "corporate veil is pierced" for the

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and companies," Art. VII(2); "alien-controlled enterprises," Art. VII(3); "enterprises controlled by such nationals and companies," Art. VII(4); "companies of [one] Party controlled by [the other's] nationals and companies," Art. XVI(2).

purpose of making economic interest, rather than legal relationship, the justification and the basis for protection.

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 233 (1956); *see also Commercial Treaties: Hearing before a Subcommittee of the Senate Committee on Foreign Relations*, 82d Cong., 2d Sess. 4-5 (1952) (statement of Harold F. Linder, Dep. Ass't Sec'y of State for Econ. Affairs). One of the main objectives of the Treaty, as revealed by Article VII and implemented in Article VIII(1), was to permit American investors abroad to choose the form of organization of their investments without sacrificing their rights of control because of irrelevant technical and formal distinctions. *See Walker, supra*, 5 Am. J. Comp. L. at 236 (treaty text designed, *inter alia*, "to emphasize the owners' prerogatives of control and management").[6]

As of year-end 1980, $180 billion out of $213.5 billion, or 84% of U.S. direct investment abroad, was in incorporated affiliates. Whichard, *U.S. Direct Investment Abroad in 1980*, U.S. Dep't of Commerce, Survey of Current Business 20, 22, Table 3 (Aug. 1981). No wonder the State Department said that respondents' interpretation excluding subsidiaries from the coverage of Article VIII(1) "would gut Japanese FCN Treaty of most of its value . . . ." Appendix A, *infra*, at 3a. The "reasonable" beliefs and suppositions indulged by respondents, the government and Judge Reavley would expose the overwhelming bulk of U.S. foreign investment in Japan (and of Japanese foreign investment in the United States) to the type of domestic legislation restricting employment of

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6 The argument that the investor, having chosen the corporate form, must accept the burdens along with the benefits, though superficially attractive, is question-begging. The very purpose of the FCN treaties was to change the normal incidence of burdens and benefits as between forms of business enterprise to accommodate the preference for the corporate form. To say what package of burdens the foreign investor "must accept" when it chooses the corporate form, one must first look to the substantive provisions of the Treaty. That is, we must first decide whether Article VIII(1) extends to subsidiaries before we can know the effect on the employment right of choosing the corporate form for the investment.

executives and specialists against which Article VIII(1) was designed to protect the foreign investor.

Once this central point is grasped, as both the Courts of Appeals grasped it, it is a matter of indifference, or at best aesthetic preference, whether the protection of the Treaty is extended to these subsidiaries by piercing the corporate veil or by recognition of the parent's right.

It remains only to address the various governmental positions put before the Court. The government proffers in support of respondents' position a communication from the Japanese Ministry of Foreign Affairs rejecting the piercing-the-veil approach. Statement of the Japanese Ministry of Foreign Affairs delivered to U.S. Embassy, Tokyo, on February 26, 1982, *reprinted in* Dep't of State Telegram No. 03300 from U.S. Embassy, Tokyo, to the Dep't of State, Feb. 26, 1982, U.S. Br., App. B at 14a-15a; *but see* Brief herein for the Ministry of International Trade and Industry of the Government of Japan as *Amicus Curiae*. The foreign treaty partner's construction, however, is not decisive on the question of the scope of treaty obligations. *Factor v. Laubenheimer*, 290 U.S. 276, 298 (1933). The considerations adduced in that case are especially weighty here, where numerous treaties "which employ similar structure and terminology" will be affected by the Court's decision. Dep't of State Telegram No. 227464 to U.S. Embassy, Tokyo, Aug. 29, 1979, Appendix A, *infra*, at 3a. Indeed, the Danish government, a party to one of these treaties, has officially aligned itself in this Court in support of Sumitomo's position. *See* Statement of the Danish Government Concerning the Interpretation of the Treaty of Friendship, Commerce and Navigation between the Kingdom of Denmark and the United States of America, signed on 1 October 1951 (Dec. 23, 1981), *reprinted in* Brief *Amicus Curiae* for the East Asiatic Co., Ltd. *et al.* in Support of Petitioner Sumitomo Shoji America, Inc., App. B at 31a.

As to the stance of the U.S. Government, its present assertion that domestic subsidiaries are excluded from Article VIII(1) coverage is certainly not the kind of consistent, long-standing administrative interpretation that is entitled to significant weight in the courts. *See Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). Only two weeks

before issuing the Atwood letter on September 11, 1979 (App. 307a), the State Department was saying that the position in that letter would "gut" the Treaty. *See* Dep't of State Telegram No. 227464. Appendix A, *infra,* at 3a.[7] The Fifth Circuit rightly dismissed the Atwood letter "as an aberration in State Department policy." *Speiss v. C. Itoh, supra,* 643 F.2d at 358 n.3, Pet. App. 70a n.3. The teaching of *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956), is applicable here: "Against . . . prior longstanding and consistent administrative interpretation . . . [a] more recent *ad hoc* contention as to how the statute should be construed cannot stand."

The government disparages the earlier Marks letter (App. 94a) which supported Sumitomo's position, with the comment that it "set forth no legal analysis of the question." U.S. Br. at 19. But as the Second Circuit remarked,

> both [the Marks and Atwood] letters were conclusory in tone, providing little guidance as to how the authors reached the position adopted. Finally, neither of the letters referred to any documentary evidence supporting its position, nor did the 1979 [Atwood] letter explain how the 1978 letter writer [Marks] had fallen into error.

638 F.2d at 558 n.5, Pet. App. at 12a n.5.

In this Court the government comes down on the Atwood side of the Atwood-Marks argument, thus rejecting the piercing-the-veil rationale discussed above. In doing so, however, it has some difficulty dealing with the regulations promulgated under the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 *et seq.* (the "INA"), authorizing treaty trader visas for persons employed by U.S. companies controlled by foreign nationals. 22 C.F.R. § 41.40 (1981). The regulations speak of such companies as "having the nationality of the treaty country." The government parries with the assertion that the INA has been administratively broadened in this respect. U.S. Br. at 6. But the INA requires that for a treaty trader visa to issue, the alien must be "*entitled* to enter the United States under and in pursuance of the provisions of a treaty of commerce and

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7 Nowhere in its brief does the United States attempt to deal with this telegram.

navigation . . . ." INA § 101(a)(15)(E)(emphasis added). The government's brief does not explain how administrative fiat can expand the entitlement under the Treaty. Thus, despite what the government may say here, the regulations it enforces expressly adopt the piercing-the-veil approach to Article VIII(1) rights.

As to the parent's-right approach, the government's brief is much more hospitable—one might almost say inviting—as demonstrated above. *See* pp. 4-5, *supra*. Perhaps the figures cited above on the proportion of U.S. investment abroad that is conducted through incorporated affiliates may account for this Janus-like attitude in the government's brief. Whatever the reason, at bottom, the position of the government and that of Sumitomo are not as irreconcilable as may at first appear.

In any case, the usual strictures about the weight to be given to official interpretation of treaties are inapposite here. The varying governmental positions presented to this Court are neither uniform nor consistent enough to control the interpretation of Article VIII(1). They certainly should not operate to frustrate the manifest objective of the Article to permit U.S. (and so, reciprocally, Japanese) investors to employ their fellow-citizens in executive and specialist positions in their enterprises abroad, no matter what the form of business organization in which these enterprises are cast.

II. THE TREATY PRECLUDES A TITLE VII ATTACK ON SUMITOMO'S EMPLOYMENT OF JAPANESE TREATY TRADERS IN EXECUTIVE AND SPECIALIST POSITIONS.

Sumitomo's position is that the Treaty affords a Japanese investor the right to manage and control its investment by engaging Japanese nationals of its choice in executive and other specialist positions. The scope of this right is spelled out in the treaty trader provisions of the INA and the regulations thereunder.

The basic source of the employment right is Article VIII(1) of the Treaty, although, as pointed out in our brief at pages 20-22, that Article must be read together with Article VII (establishing the right of Japanese investors to "manage and

control" their enterprises in the United States) and Article I (providing for entry of Japanese nationals for purposes of carrying out U.S. Japanese trade and related commercial activities). INA § 101(a)(15)(E) is also directly relevant in the construction of the treaty right. It was enacted during the period when the post-World War II FCN treaties were being negotiated and was designed to carry out their entry and employment provisions.[8] Together with its implementing regulations, it reflects the contemporaneous understanding of Congress as to the scope of the rights granted.[9]

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8 Congress first recognized the alien trading provisions of FCN treaties by creating a new category of non-immigrant aliens "entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present, existing treaty of commerce and navigation" in the Immigration Act of 1924, ch. 190, § 3(6), 43 Stat. 153, 155. The treaties then in force gave blanket rights "to carry on trade, wholesale and retail," *e.g.*, Treaty of Commerce and Navigation between the United States of America and Japan, Feb. 21, 1911, Art. I, 37 Stat. 1504, or "to engage in . . . commercial work of every kind . . . ." Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany, Dec. 8, 1923, Art. I, 44 Stat. 2132, 2133. Under these provisions aliens gained entry for the purpose of carrying on purely local trade or business. In the belief that this went beyond the intention of the treaties, Congress, in 1932, amended the Act to authorize treaty trader visas for entry "solely to carry on trade between the United States and the foreign state of which [the alien] is a national . . . ." Act of July 6, 1932, ch. 434, 47 Stat. 607-08. The post-World War II FCN draft picked up this limitation, *see, e.g.*, United States-Japan Treaty, Art. I(1)(a), and added a further category of entries "for the purpose of developing and directing the operations of an enterprise in which [the alien has] invested . . . a substantial amount of capital . . . ." *Id.* Art. I(1)(b). This new category was promptly reflected in the "treaty investor" provisions of the 1952 Act. INA § 101(a)(15)(E)(ii). Thus, it is apparent that, from the beginning, the treaty trader provisions of the immigration laws were designed to carry out U.S. obligations under the FCN treaties, and the post-World War II modernization of both the INA and the treaties reflects a single, coherent legislative intention.

9 The present regulations do not differ materially from those first adopted to implement INA § 101(a)(15)(E)(i). *Compare* 22 C.F.R. § 41.40 (1981) *with* 17 Fed. Reg. 11577 (1952) (predecessor regulation). A technical change occurred in 1959 when the words "under and in pursuance of the provisions of a treaty of commerce and navigation" were replaced by language spelling out the meaning of that requirement: "[that the alien] will be engaged in duties of a supervisory or executive character, or . . . has special qualifications that will make his services essential to the . . .

There should be no uncertainty about the scope of Sumitomo's claim. *Cf.* U.S. Br. at 22 n.13. Sumitomo takes the position that it is entitled to everything the Treaty gives it—the right "to engage . . . accountants and other technical experts, executive personnel, attorneys, agents and other specialists of [its] choice"—without limitation by Title VII. The content of these categories is spelled out in the INA and its implementing regulations governing the issuance of E-1 or treaty trader visas. Thus, the question whether a particular Sumitomo employee falls within the protection of Article VIII(1), and therefore outside the scope of Title VII, depends on whether that employee has been able to demonstrate to the State Department and the Immigration and Naturalization Service that he is entitled to hold an E-1 visa.[10]

The statutory and regulatory scheme is summarized at pages 3-6 of the government's brief. For a treaty trader visa to issue, the applicant must be "engaged in duties of a supervisory or executive character," in accordance with rigorously and narrowly defined criteria. U.S. Br. at 4, *citing* 22 C.F.R. § 41.40(a)(2); 9 Foreign Affairs Manual, Part II, § 41.40 Notes 10 and 13, *id.* § 41.41 Note 4. More particularly, in accordance with recent instructions issued by the State Department, "a position will be regarded as 'executive' or 'supervisory' for treaty trader purposes only if it is a top-level management

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employer's enterprise . . . ." 24 Fed. Reg. 6683 (1959). In 1974 a similar clarification made it explicit that "[t]he employment [of the applicant] must be by an individual employer having the nationality of the treaty country . . . or by an organization which is principally owned by . . . persons having the nationality of the treaty country . . . ." 39 Fed. Reg. 26153-54 (1974). The regulations thus reflect clearly all three of the Treaty Articles referred to in the text, at pages 10-11, *supra*. The original version looked most directly to the entry provisions of Article I. The 1959 elaboration specifically limiting entry to executive and specialized personnel draws from Article VIII(1). The 1974 revision, focusing on the identity of the treaty trader's employer, evokes the control and management conception of Article VII(1).

10 During Fiscal Year 1980 the Department of State issued 27,301 treaty trader and treaty investor visas for all countries. U.S. Dep't of State, Bureau of Consular Affairs, Immigrant Visa Control & Reporting Division, *Statistics on Nonimmigrant Visa Issuances During Fiscal Year 1980*. The group protected by FCN treaties thus represents an infinitesimal fraction of the U.S. job market.

position." The visa cannot issue unless "the position the alien would occupy 'principally requires management skills, or entails supervision over and key responsibility for a large portion of a firm's operation . . . .' " As to other specialized personnel, the government's account shows that they must be "truly essential to the firm's operations in the U.S." in the sense that they perform functions "that an American worker cannot do or cannot be trained to do . . . ." U.S. Br. at 5, *citing* Dep't of State Telegram No. 089624 to Japanese Posts, ¶¶ 2-10, sent to all Diplomatic and Consular Posts on July 10, 1981, *reprinted in* U.S. Br. App. A. (instruction regarding the assessment of an "executive/supervisory position" and "essential skills"). In short, E-1 visas may be issued only to members of a core group of key executives and specialists necessary for the investor to control its U.S. enterprise.

The government accepts that "as a wholly Japanese-owned trading company, Sumitomo may continue to obtain the services of Japanese nationals, to the extent they qualify for treaty trader visas under the standards described above . . . ." U.S. Br. at 6. That is exactly the position Sumitomo takes in this case, adding only that the scope of the categories "executive personnel" and "other specialists" is defined by INA § 101(a)(15)(E) and its regulations, specifying the requirements for treaty trader visas.[11]

The right as thus defined is unqualified in the sense that it is not contingent on the treatment of domestic enterprises (national treatment) or on the treatment of enterprises of third countries (most-favored-nation treatment). In particular, it is non-contingent in that it is designed to override restrictions in the law of the host country upon the employment of home country nationals in the covered positions.

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11 At one point, the government raises the possibility of a distinction between "executive personnel" and the other Article VIII(1) categories. It suggests that the latter may not fall within the investor's right to "control and manage" its subsidiary granted in Article VII. U.S. Br. at 22 n.12. But when we recall that for an E-1 visa to issue to someone other than an executive or supervisory employee, he must be "truly essential to the firm's operations in the U.S." and without a U.S. counterpart, *id.* at 5, it hardly seems possible that an investor could control and manage the enterprise unless it could engage such home country nationals.

Title VII, if applied to "executive personnel" and "other specialists" necessary to manage and control the investment, would be the very kind of local legislation against which the Treaty sought to protect the foreign investor. There is no doubt that if respondents had their way, Title VII would restrict the right of Sumitomo to employ Japanese nationals in these executive and specialist positions. Indeed, that is the very object of plaintiffs' lawsuit: the complaint asks for an injunction "[d]irecting defendant to promote plaintiffs . . . to executive, managerial, and/or sales positions . . . ." App. 10a. Respondents have not produced a scrap of evidence, either in the language of Title VII or in its legislative history, to suggest that Congress intended, or was even aware of the possibility of such a drastic abridgement of treaty rights. In the absence of such an expression, the unquestioned doctrine is that the Court will not so construe the statute. *Cook v. United States*, 288 U.S. 102, 119-20 (1933); *see Weinberger v. Rossi*, No. 80-1924, ____ U.S ____, 50 U.S.L.W. 4354, 4355-56 (Mar. 31, 1982).

In order to avoid the force of the injunction against implied abridgement of treaty rights, respondents seek to construe away any such encroachment by an impermissibly restrictive interpretation of the object of Article VIII(1). They contend that the Article was designed only to override "bad" restrictions on investor choice of personnel—so-called "percentile limitations"—not "good" restrictions, like anti-discrimination laws. But this proposition (which incidentally *concedes* that the Article VIII(1) right is non-contingent) cannot stand.

The language of the Article, which is unmistakably affirmative, provides no basis for such constricted reading. So respondents are compelled to seek support in scraps of negotiating history and general commentary on the Treaty. For example, they cite Herman Walker's proposition that the objective of the Treaty "is to secure non-discrimination, or equality of treatment: a sort of 'equal protection of the laws' objective." Res. Br. at 27, *quoting* Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 Minn. L. Rev. 805, 810-11 (1958). That remark, however, occurs in a passage discussing "the extensive use of so-called contingent standards as the cornerstone of rule-making." *Id.* at 810. As has been pointed out, Article VIII(1) is one of the few provisions of the

Treaty that is explicitly *non*-contingent. Walker himself identified it as such. *Id.* at 811, 813. And in commenting specifically on the question of employment rights, he said that the Article was directed against "percentile restrictions *and the like* . . . ." Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 234 (1956) (emphasis added). Thus, he expressly recognizes that it is not confined to percentile restrictions *simpliciter. See also* Brown, *Treaty, Guaranty, and Tax Inducements for Foreign Investments*, 40 Am. Econ. Review, Papers & Proceedings 486, 487 (1950).

The negotiating documents relied on by respondents are equally insubstantial. The Foreign Service Despatch on the German treaty quoted at page 22 of respondents' brief says only that the "major special purpose" of the Article—not the exclusive purpose—"is to preclude the imposition of 'percentile legislation.' " Indeed, read as a whole, the document supports Sumitomo's position:

> The first sentence [of Article VIII(1)] is of a general nature, being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel.

Foreign Service Despatch No. 2529 from HICOG, Bonn, to the Dep't of State, March 18, 1954, App. 181a, 182a.

Similarly, the Japanese documents do not support respondents' limited construction of Article VIII(1). The 1951 despatch quoted by respondents does show, of course, that the Japanese inquired whether there were some professions in the U.S. to which entry was barred by reason of alienage. Res. Br. at 21, *quoting* Foreign Service Despatch No. 915 from USPOLAD, Tokyo, to the Dep't of State, Dec. 17, 1951, App. 120a, 123a. The Department replied in the affirmative and pointed out that paragraph (2) of Article VIII, as opposed to paragraph (1), was addressed to this problem. *See* Dep't of State Airgram No. A-453 to USPOLAD, Tokyo, Jan. 7, 1952, App. 130a, 134a. Indeed, it was *only* as to such professions and licensed occupations that legislation excluding aliens was in effect in the 1950s. *See, e.g., Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392

(1927) (upholding state statute requiring owners of licensed pool halls to be citizens). There were no percentile limitations on the employment of "executive personnel" at that time, because such legislation as applied to general employment has been unconstitutional at least since this Court's decision in *Truax v. Raich*, 239 U.S. 33 (1915). Nor was there percentile legislation in Japan in 1952. *See* Alexander, *Foreign Investment Laws and Regulations of the Countries of Asia and the Far East*, 1 Int'l & Comp. L. Q. 29, 37 (1952).

In any case, it is artificial to construe Article VIII(1), as respondents would have it, by an imputation of what "the Japanese negotiators were seeking . . . . " Res. Br. at 21. As has repeatedly been shown, the FCN treaties in general and the employment provisions in particular were put forward by the United States. *See* Pet. Br. at 23-25. Respondents themselves concede that U.S. opposition to foreign requirements for local hiring was an important motivating factor underlying Article VIII(1). Res. Br. at 22 n.25. And the government's brief acknowledges that

> [t]he purpose of Article VIII(1) was to override these percentile restrictions *so that American businesses operating abroad would be able to select U.S. nationals for essential positions.*

U.S. Br. at 24-25 n.14 (emphasis added).

Today, thirty years later, Sumitomo seeks only that same right.

Of course, Title VII does not by its terms prefer U.S. citizens over aliens. But its practical consequences for the foreign investor, should respondents prevail, do not look so very different from the "percentile legislation" concededly overridden by the Treaty. Defendants who are found to have violated Title VII in class actions such as this one are frequently faced with decrees requiring percentage hiring quotas or goals proportionate to the share of the plaintiffs in the relevant employment pool. *E.g.*, *Association against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981) (city must offer 41% of firefighter positions to minority group applicants during relevant period); *Phillips v. Joint*

Legislative Committee, 637 F.2d 1014 (5th Cir. 1981) (state agencies required to set goals of approximately 20% for black employees and to hire one black for every two whites until goal is achieved); *United States v. Elevator Constructors Local No. 5*, 538 F.2d 1012 (3d Cir. 1976) (union ordered to establish a goal for black membership of 23% and a black referral quota of 33%); *United States v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (employer ordered to promote one black foreman for every white until there are 15 black foremen in plant). Similarly, employers seeking to protect themselves against Title VII actions may be well advised to hire on a quota basis to avoid the statistically "disparate impact" that makes out a *prima facie* case under Title VII. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 947, 956-57, 1026 (1982); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (proof of disparate impact of employment practices makes out *prima facie* case of Title VII violation). In other words, the application of Title VII that the respondents propose here could well give rise to a restrictive quota on hiring of Japanese nationals, not so different in effect, even if worlds apart in motivation, from the "percentile limitations" admitted to have been the principal target of Article VIII(1).

Here again, the government seems, in effect, to agree with Sumitomo's position. It suggests that Article VIII(1) may "itself constitute[] a legislative-type validation (as a 'business necessity') of a citizenship preference (at least for the top-level 'executive' positions mentioned in that Article) that excuses a company of Japan from showing the job relatedness of a citizenship preference on a case-by-case basis." U.S. Br. at 26. This is an unnecessarily involuted way of reaching the result. There is no need to read Article VIII(1) as a "legislative-type" business necessity exception to Title VII, which was, in any event, enacted after the adoption of the Treaty and so could not have been amended by it. It is much more straightforward to say that Article VIII(1) establishes a non-contingent right to employ Japanese nationals in executive and specialist positions and that Title VII is therefore inapplicable to those employees. That is exactly what the government suggests in the footnote to the sentence quoted above:

> Article VII(1) of the Treaty gives nationals and companies of Japan the right to "control and manage" their enterprises in the United States, and it could be argued that the discretion to select top-level "executive personnel" in whom the nationals and companies have confidence is a necessary component of that right.

Id. at 26 n.16. It not only "could be argued," but that is exactly what Sumitomo *does* argue. We add only that the necessity implicit in Article VII(1) is made explicit in Article VIII(1). And the scope of the terms "executive personnel" and "other specialists" is defined by the contemporaneous enactment of INA § 101(a)(15)(E) and its implementing regulations.

These questions of treaty and statutory interpretation are fully ripe for adjudication on the record as it stands, contrary to the contention of the government. U.S. Br. at 23-30. Sumitomo's motion to dismiss presents a pure question of law and needs no further factual amplification. The legal issue tendered here is whether Sumitomo is entitled to employ Japanese nationals qualifying for treaty trader visas in executive and other specialist positions in accordance with Article VIII(1) of the Treaty, INA § 101(a)(15)(E)(1) and the regulations thereunder, without limitations flowing from the provisions of Title VII.

The case was heard and disposed of below on the footing that the positions in controversy are occupied by Japanese nationals carrying E-1 treaty trader visas. Plaintiffs' allegations of discrimination "on the basis of nationality," Complaint ¶ 13, App. 9a, are addressed to "Sumitomo's practice of employing almost exclusively Japanese men" for these positions, as appears from their brief. Res. Br. at 5. In this Court, respondents further acknowledge that "many, if not all, of the persons who are classified as 'Oriental' [in Sumitomo's EEO-1 report], entered the United States as treaty traders." Res. Br. at 30. And the government appears to agree that they are probably all "executive personnel" within the meaning of the Treaty. U.S. Br. at 26 n.16; *see id.* at 29 n.18. Even if a remand were appropriate for formal proof of which particular employees have E-1 visa status, the proof would be mechanical and

ministerial. It would not alter or illuminate the legal issue presented.

That issue should be resolved on the record before this Court. Far from remanding without reaching the question, the Court should decide it now as a matter of sound judicial administration. Only by doing so can it provide authoritative guidance for any further proceedings that may be necessary, thus preventing needless proliferation of issues for trial and possibly another appeal to this Court.

III. SUMITOMO'S CITIZENSHIP PREFERENCE DOES NOT VIOLATE TITLE VII IN ANY EVENT.

As this Court held in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973), nationality is not a prohibited criterion of employment under Title VII. Respondents' effort to remedy their employment grievances by invoking that statute stretches it far beyond what it can bear. The class of persons allegedly discriminated against—persons residing in the United States who are not Japanese treaty traders—is, by any measure, overly broad. It is surely not the kind of historically disadvantaged class of persons that Title VII was designed to protect. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (purpose of Congress was "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens"); *United Steelworkers of America v. Weber*, 443 U.S. 193, 203 (1979) ("[I]t was clear to Congress that '[t]he crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey), and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed."). No stigma attaches in American society to the condition of not being Japanese.

Respondents seek to construct claims of discrimination not only on grounds of "nationality" but also on grounds of "sex" and "national origin." The government's brief suggests the addition of the category "race." U.S. Br. at 7 n.4. One is left to speculate why they have omitted "color," since few Japanese

are black, white or brown, and "religion," in view of the well-known paucity of Hindus, Moslems, Christians and Jews in Japan. But respondents' subsidiary claims are all disposed of by the principle of Occam's razor: "What can be done with fewer [assumptions] is done in vain with more." The New Columbia Encyclopedia 2981 (4th ed. 1975). Respondents' lack of Japanese nationality (the essential criterion for treaty trader status) sufficiently explains their exclusion from the hiring preference; it is, hence, irrelevant that they may also be female or Christian or Mexican-American or fair-skinned or tall.

In the last analysis, respondents are attempting to use Title VII for a purpose Congress never intended. Protection of job opportunities for Americans as against nonimmigrant foreign nationals is a function not of Title VII, but of the Immigration and Nationality Act. Plaintiffs' complaint confuses these disparate statutory schemes.

Conclusion

For the reasons developed in this and the principal Brief for Petitioner and Cross-Respondent, the decision of the United States Court of Appeals for the Second Circuit should be reversed and the case remanded with directions to dismiss.

Respectfully submitted,

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ABRAM CHAYES

J. PORTIS HICKS

April 19, 1982

APPENDIX A

[SEAL]

DEPARTMENT OF STATE
Washington, D.C. 20520

March 11, 1982

J. Portis Hicks, Esquire
Wender, Murase & White
400 Park Avenue
New York, New York

Dear Mr. Hicks:

In response to a request from one of the parties, we have retrieved and decontrolled an additional document relating to the issues raised in *Avigliano* v. *Sumitomo Shoji America, Inc.*, pending in the Supreme Court. With the approval of the Solicitor General, we are making this document available to all interested parties.

Sincerely,

/s/ JOHN R. CROOK

John R. Crook
Assistant Legal Adviser for
Economic and Business Affairs

Enclosure

[SEAL] *Department of State*

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L/EB JOHN R. CROOK

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TAGS: ETRO, PGOV, EINV

SUBJECT: FOREIGN MINISTRY INTEREST IN DISCRIMINATION CASE, LISA M. AVIGLIANO, ET AL., AGAINST SUMITOMO SHOJI AMERICA, INC.

REF: (A) TOKYO 15234 (B) TOKYO 13800

1. FIRST SECRETARY NANAO OF JAPANESE EMBASSY REQUESTED APPOINTMENT WITH DEPARTMENT LEGAL OFFICERS AUGUST 16 TO RAISE SAME QUESTIONS POSED PARA 5 REF B. HIS REPORT BACK TO TOKYO SHOULD HAVE BEEN RECEIVED BY NOW, AND SHOULD HELP TO CLARIFY OUR VIEWS. DEPARTMENT WILL PROVIDE EMBASSY WITH MORE DETAILED TALKING POINTS ON THIS ISSUE AS SOON AS POSSIBLE.

2. DEPARTMENT REITERATED TO NANAO VIEW SET FORTH IN MARKS

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LETTER THAT FCN COVERS INVESTMENT THROUGH HOST COUNTRY—INCORPORATED SUBSIDIARIES AS WELL AS OTHER FORMS. DEPARTMENT OPINION IS BASED ON LANGUAGE OF TREATY ITSELF, WHICH CLEARLY SHOWS INTENT TO COVER SUCH SUBSIDIARIES (E.G., ARTICLE I(1) TREATY INVESTOR STATUS AND, MOST IMPORTANTLY, BROAD DEFINITION OF RIGHTS OF NATIONAL TREATMENT AND ESTABLISHMENT AT ARTICLE VII(1) WHICH AFFECTS INTERPRETATION OF OTHER ARTICLES, ALTHOUGH LANGUAGE OF EACH SPECIFIC PROVISION OF TREATY MUST BE EXAMINED SINCE DRAFTING AND INTENT DO VARY AND A FEW PROVISIONS EXCLUDE SUBSIDIARY COVERAGE.); ON DISTINCTION BETWEEN ISSUE OF TREATY COVERAGE OF SUCH SUBSIDIARIES (WHICH ON ITS FACE THE TREATY DOES) AND THAT OF THE NATIONALITY OF SUCH SUBSIDIARIES, AS DEFINED UNDER ARTICLE XXII(3) (THERE IS ABSOLUTELY NO CONTRADICTION BETWEEN TREATY COVERAGE AND RECOGNITION OF HOST COUNTRY NATIONALITY OF CORPORATIONS THEREIN INCORPORATED); AND ON POLICY GROUNDS, SINCE EXCLUSION OF INVESTMENT THROUGH LOCALLY-INCORPORATED SUBSIDIARIES WOULD GUT JAPANESE FCN OF MOST OF ITS VALUE IN INVESTMENT AREA, WITH ADVERSE IMPLICATIONS FOR ALL OUR OTHER FCN'S WHICH EMPLOY SIMILAR STRUCTURE AND TERMINOLOGY.

3. DEPARTMENT SOMEWHAT SURPRISED THAT, ALTHOUGH NOT COMMITING ITSELF TO AN OPPOSING VIEW, FOREIGN MINISTRY SHOULD QUESTION THIS POINT, PARTICULARLY SINCE BOTH SUMITOMO AND ITOH HAVE ARGUED FOR TREATY COVERAGE. (FYI: ACCEPTANCE OF DEPARTMENT INTERPRETATION OF FCN SUBSIDIARY COVERAGE DOES NOT DECIDE OUTCOME OF CIVIL RIGHTS LITIGATION IN WHICH SUMITOMO AND ITOH FIND THEMSELVES. DEPARTMENT WILL POUCH MARKS LETTER TO EMBASSY; WE ARE WEIGHING TAKING FURTHER STEPS IN THIS LITIGATION TO CLARIFY OUR VIEWS END FYI). IN OUR EFFORTS TO REFINE OUR POSITION HERE WE WOULD WELCOME EMBASSY ASSISTANCE ON FOLLOWING:

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HAVE JAPANESE COURTS, GOJ EVER CONSTRUED FCN, OR SIMILAR BILATERAL TREATY, WITH RESPECT TO SUBSIDIARY COVERAGE? HOW DO OTHER FCN'S TO WHICH JAPAN IS A PARTY DEAL WITH THIS ISSUE? NOTE THAT JAPAN-EGYPT BILATERAL INVESTMENT TREATY (BIT) OF 1978 FOLLOWS EUROPEAN BIT MODELS WITH BROAD DEFINITION OF COVERED INVESTMENT, INCLUDING INVESTMENT ACCOMPLISHED THROUGH HOST COUNTRY SUBSIDIARIES, WHILE AT THE SAME TIME RECOGNIZING THAT NATIONALITY OF SUCH SUBSIDIARIES IS THAT OF COUNTRY OF INCORPORATION AND HQ. (ARTICLE I(1) AND (4)).

4. WE BELIEVE BROAD INTERPRETATION PARAGRAPH 2 SERVES BOTH US AND JAPANESE INTERESTS, AND IS CONSISTENT WITH GOJ POLICY AS REFLECTED IN BIT WITH EGYPT AND OECO PRACTICE. WE WOULD BE INTERESTED IN EMBASSY VIEWS ON ANY FACTORS WHICH MIGHT CAUSE GOJ TO FAVOR A NARROWER READING. VANCE

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DEPARTMENT OF STATE

Washington, D.C. 20520

March 11, 1982

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John R. Crook
Assistant Legal Adviser for
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Enclosure

→ L/EB
Sumitomo
File

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INCORPORATED SUBSIDIARIES AS WELL AS OTHER FORMS. DEPARTMENT OPINION IS BASED ON LANGUAGE OF TREATY ITSELF, WHICH CLEARLY SHOWS INTENT TO COVER SUCH SUBSIDIARIES (E.G., ARTICLE I(1) TREATY INVESTOR STATUS AND, MOST IMPORTANTLY, BROAD DEFINITION OF RIGHTS OF NATIONAL TREATMENT AND ESTABLISHMENT AT ARTICLE VII(1) WHICH AFFECTS INTERPRETATION OF OTHER ARTICLES, ALTHOUGH LANGUAGE OF EACH SPECIFIC PROVISION OF TREATY MUST BE EXAMINED SINCE DRAFTING AND INTENT DO VARY AND A FEW PROVISIONS EXCLUDE SUBSIDIARY COVERAGE.); ON DISTINCTION BETWEEN ISSUE OF TREATY COVERAGE OF SUCH SUBSIDIARIES (WHICH ON ITS FACE THE TREATY DOES) AND THAT OF THE NATIONALITY OF SUCH SUBSIDIARIES, AS DEFINED UNDER ARTICLE XXII(3) (THERE IS ABSOLUTELY NO CONTRADICTION BETWEEN TREATY COVERAGE AND RECOGNITION OF HOST COUNTRY NATIONALITY OF CORPORATIONS THERE IN INCORPORATED); AND ON POLICY GROUNDS, SINCE EXCLUSION OF INVESTMENT THROUGH LOCALLY-INCORPORATED SUBSIDIARIES, WOULD GUT JAPANESE FCN OF MOST OF ITS VALUE IN INVESTMENT AREA, WITH ADVERSE IMPLICATIONS FOR ALL OUR OTHER FCN'S WHICH EMPLOY SIMILAR STRUCTURE AND TERMINOLOGY.

3. DEPARTMENTSOMEWHAT SURPRISED THAT, ALTHOUGH NOT COMMITING ITSELF TO AN OPPOSING VIEW, FOREIGN MINISTRY SHOWED QUESTION THIS POINT, PARTICULARLY SINCE BOTH SUMITOMO AND ITOH HAVEARGUEDFOR TREATY COVERAGE. (FYI: ALCEPTANCE OF DEPARTMENT INTERPRETATION OF FCN SUBSIDIARY COVERAGE DOES NOT DECIDE OUTCOME OF CIVIL RIGHTS LITIGATION IN WHICH SUMITOMO AND ITOH FIND THEMSELVES. DEPARTMENT WILL POUCH MARKS LETTER TO EMBASSY; WE ARE WEIGHING TAKING FURTHER STEPS IN THIS LITIGATION TO CLARIFY OUR VIEWS END FYI). IN OUR EFFORTS TO REFINE OUR POSITION HERE WE WOULD WELCOME EMBASSY ASSISTANCE ON FOLLOWING:

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HAVE JAPANESE COURTS, GOJ EVER CONSTRUED FCN, OR SIMILAR BILATERAL TREATY, WITH RESPECT TO SUBSIDIARY COVERAGE? HOW DO OTHER FCN'S TO WHICH JAPAN IS A PARTY DEAL WITH THIS ISSUE? NOTE THAT JAPAN-EGYPT BILATERAL INVESTMENT TREATY (BIT) OF 1978 FOLLOWS EUROPEAN BIT MODELS WITH BROAD DEFINITION OF COVERED INVESTMENT, INCLUDING INVESTMENT ACCOMPLISHED THROUGH HOST COUNTRY SUBSIDIARIES, WHILE AT THE SAME TIME RECOGNIZING THAT NATIONALITY OF SUCH SUBSIDIARIES IS THAT OF COUNTRY OF INCORPORATION AND NO. (ARTICLE I(1) AND (4)).

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4. WE BELIEVE BROAD INTERPRETATION PARAGRAPH 2 SERVES BOTH US AND JAPANESE INTERESTS, AND IS CONSISTENT WITH GOJ POLICY AS REFLECTED IN BIT WITH EGYPT AND OECD PRACTICE. WE WOULD BE INTERESTED IN EMBASSY VIEWS ON ANY FACTORS WHICH MIGHT CAUSE GOJ TO FAVOR A NARROWER READING. VANCE

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APPENDIX B

Chronology of State Department Release of Documents

Date	Documents Released by State Dept.	Status of Litigation on Date of Release	Status of Documents in Record
10/17/78	State Dept. letter (Marks to EEOC) affirming right to invoke Article VIII(1) of Treaty by U.S. subsidiary	Sumitomo's motion to dismiss pending in United States District Court for the Southern District of N.Y.	App.—94a-97a
8/15/79	Various State Dept. file documents relating to FCN treaties (140 pages)	After District Court's 6/5/79 decision denying Sumitomo's motion to dismiss and after District Court had granted certification of issue for immediate appeal pursuant to 28 U.S.C. 1292(b).	App.—107a-306a
9/11/79	State Dept. letter (Atwood to EEOC) regarding right to invoke Article VIII(1) of Treaty by U.S. subsidiary, taking opposite position from Marks letter of 10/17/78	After Sumitomo's motion in the District Court for rehearing of 6/5/79 decision	App.—307a-308a
10/29/79	Various State Dept. file documents relating to FCN treaties (112 pages)	Same.	Not in record

Date	Documents Released by State Dept.	Status of Litigation on Date of Release	Status of Documents in Record
9/26/80	9/9/80 document purporting to be letter of State Dep't supporting 9/11/79 Atwood letter.*	After filing of Sumitomo's brief on appeal in the United States Court of Appeals for Second Circuit.	App.—322a-324a
11/30/81 **	Various State Dept. file documents relating to FCN treaties (172 pages)	After certiorari had been granted by this Court.	Not in record, but certain documents submitted to the Court by counsel for respondents 2/25/82
12/18/81	Various State Dept. file documents relating to FCN treaties (53 pages)	Same.	Not in record
1/8/82	Legible copy of one of documents furnished to parties on 11/30/81	Same.	Not in record

* In its January 9, 1981 decision the Second Circuit rejected this document as improperly submitted by EEOC. 638 F.2d at 558 n.5, Pet. App. at 12a n.5.

** On October 1, 1980, Sumitomo made a comprehensive FOIA request to the State Department for documents relating to various FCN Treaties containing articles similar to Article VIII(1). There was no response to this request by the State Department until January 13, 1982, five days prior to the due date of Sumitomo's brief herein. On that date, and on January 15, 1982, the State Department's FOIA office released selected documents relating only to FCN treaties with Uruguay and Israel.

Date	Documents Released by State Dept.	Status of Litigation on Date of Release	Status of Documents in Record
1/11/82	Various State Dept. file documents relating to FCN Treaties (over 1000 pages)	Same.	Not in record
1/13/82	Various State Dept. file documents relating to FCN Treaty with Uruguay*	Same.	Not in record
1/15/82	Various State Dept. file documents relating to FCN Treaty with Israel**	Same.	Not in record
1/27/82	Various State Dept. file documents relating to FCN treaties	After filing of Sumitomo's principal brief herein.	Not in record
3/11/82	Copy of State Dept. August, 1979 telegram to the U.S. Embassy, Tokyo, supporting Sumitomo's position in this litigation	After filing of all principal briefs herein.	Not in record, but included in Appendix A, *supra*.

* First set of documents released by State Department purporting to comply with 10/1/80 FOIA request made by Sumitomo.

** Second set of documents released by State Department purporting to comply with 10/1/80 FOIA request made by Sumitomo.

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No. 80-2070
No. 81-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner and Cross-Respondent,

v.

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER AND ELIZABETH WONG,

Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN JEWISH CONGRESS, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NOW LEGAL DEFENSE AND EDUCATION FUND, AND THE PUERTO-RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., *AMICI CURIAE*

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No. 80-2070
No. 81-24

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Interest of the *Amici*

This brief *amici curiae* is submitted on behalf of the American Jewish Congress, the American Civil Liberties Union, the American Jewish Committee, the Anti-

Defamation League of B'nai B'rith, the Mexican American Legal Defense and Educational Fund, the NOW Legal Defense and Education Fund and the Puerto-Rican Legal Defense Fund, Inc. The American Jewish Congress, the American Jewish Committee and the Anti-Defamation League of B'nai B'rith are concerned with the preservation of the security and the constitutional and civil rights of Jews in America through preservation of the rights of all Americans. The American Civil Liberties Union is a 250,000-member national organization dedicated to protecting the fundamental rights of the people of the United States. The Mexican American Legal Defense and Educational Fund is a national legal and educational organization devoted to protecting the civil rights of Mexican Americans. The NOW Legal Defense and Education Fund is a non-profit civil rights organization established in 1970 by leaders of the National Organization for Women to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. The Puerto-Rican Legal Defense Fund was founded in 1972 and is dedicated to the protection of civil and human rights of Puerto Ricans and other Hispanics.

Amici's interest in the instant case stems from their concern for the continued vitality of Title VII as a means to prevent and remedy discrimination in employment. They believe that the decision below erroneously interprets both the Japanese-American Treaty of Friendship, Commerce and Navigation and Title VII. *Amici* believe that if permitted to stand, that decision will inexorably lead to the weakening of Title VII's protection in all employment relationships covered by that statute.

Statement of the Case

Eleven female employees of Sumitomo Shoji America, Inc. ("Sumitomo"), a company incorporated in New York which is a wholly-owned subsidiary of a Japanese firm,

brought a class action suit in the United States District Court for the Southern District of New York under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, the Civil Rights Act of 1966, 42 U.S.C. § 1981, and the Thirteenth Amendment. Plaintiffs, who are American citizens,[1] claimed that Sumitomo's policy of hiring only male Japanese nationals for executive and managerial positions discriminated against them on the basis of sex and national origin.

Sumitomo moved to dismiss the complaint on the ground, *inter alia*, that the 1953 Japanese-American Treaty of Friendship, Commerce and Navigation, 4 U.S.T. 2065, T.I.A.S. No. 2863 (1953) (the "Treaty") exempts Japanese trading companies and their wholly-owned subsidiaries from the application of Title VII for purposes of filling executive and supervisory positions.[2]

The district court denied Sumitomo's motion to dismiss, ruling that, pursuant to Article XXII(3), Sumitomo was a United States and not a Japanese company and therefore lacked standing to invoke the freedom-of-choice provision of Article VIII(1). *Avigliano* v. *Sumitomo Shoji America, Inc.*, 473 F. Supp. 506 (S.D.N.Y. 1979), *adhered to*, 21 F.E.P. Cas. 580 (S.D.N.Y. 1979), *aff'd remanded*, 638 F.2d 552 (2d Cir.), *cert. granted*, 102 S.Ct. 50 (1981). In a supplementary opinion issued after consideration of State Department documents proffered by Sumitomo which purportedly bore on the intent of the Treaty negotiators, the district court declined to alter that ruling. *See Avigliano* v. *Sumitomo Shoji American, Inc.*, 21 F.E.P. Cas. 580 (S.D.N.Y. 1979).

Sumitomo was granted an immediate appeal of this question pursuant to 28 U.S.C. § 1292(b). *Avigliano* v. *Sumitomo Shoji America, Inc.*, 473 F.Supp. 506 (S.D.N.Y. 1979).

---

[1] One of plaintiffs is a Japanese citizen.

[2] Only the Title VII claims are presently at issue.

The United States Court of Appeals for the Second Circuit affirmed the district court's denial of Sumitomo's motion to dismiss, but on different grounds. *Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981). The Court held that the Treaty's freedom-of-choice provision could be invoked by a wholly-owned Japanese subsidiary incorporated in the United States. It further held, however, that the freedom-of-choice language of Article VIII did not wholly exempt Sumitomo from Title VII obligations:

> Subjecting a Japanese [sic] company to Title VII is consistent with the language and purpose of Article VIII of the Treaty, since Title VII, construed in the light of the Treaty, would not preclude the company from employing Japanese nationals in positions where such employment is reasonably necessary to the successful operation of its business.

Id. at 559. The court concluded by stating that, while the bona fide occupational qualification ("bfoq") exception to Title VII is ordinarly a narrow one,

> as applied to a Japanese [sic] company enjoying rights under Article VIII . . . it must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese [sic] company doing business in the United States, including such factors as a person's (1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business.

Cross-petitions for certiorari were filed and were granted by this Court on November 2, 1981, 102 S.Ct. 501 (1981).

Summary of Argument

Sumitomo, as a United States corporation, has no standing to invoke Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation Between the United States and Japan. Pursuant to Article XXII(3) of that Treaty, Sumitomo's nationality is determined by its place of incorporation. Accordingly, Sumitomo is not entitled to invoke the Article VIII(1) right given companies of one party operating within the territory of the other party to engage executive personnel "of their choice."

However, if Sumitomo could invoke the Treaty to hire executive personnel of its choice, its hiring practices are nevertheless subject to Title VII. The Treaty and Title VII are not in conflict because the Treaty only gives Japanese and American companies operating within the territory of the other the right to conduct their business and commercial activities as freely as local citizens; it does not sanction discriminatory hiring practices in violation of domestic anti-discrimination law.

Subjecting Sumitomo's employment practices to Title VII would create no maze of administrative duplication, confusion or conflict. The State Department's obligations in regulating the entry of alien treaty traders are fundamentally different from the role of the EEOC and the courts in enforcing anti-discrimination legislation.

The Second Circuit's ruling fundamentally misconceives the nature of the bfoq defense. The court below erred in suggesting that Sumitomo could establish a bfoq for persons of Japanese national origin by a showing that only such persons would be acceptable to Sumitomo, its customers or other of its employees. The law is clear that employer, customer, or co-worker preferences cannot create a bfoq.

ARGUMENT

I.

As The United States Subsidiary Of A Japanese Corporation, Sumitomo Has No Standing To Invoke Article VIII(1) Of The Treaty

The starting point for determining the nationality of a company for purposes of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2065, T.I.A.S. No. 2863 (1953) (the "Treaty"), is necessarily the Treaty itself.

Article XXII(3) of the Treaty provides that:

> As used in the present Treaty, the term "companies" means corporations, partnerships, companies, and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party *shall be deemed companies thereof and* shall have their juridical status recognized within the territories of the other Party.

4 U.S.T. at 2079-80 (emphasis added). Thus, the criterion for determining a company's nationality for purposes of invoking substantive rights under the Treaty is its place of incorporation, not the nationality of its controlling shareholder. Indeed, determining the place of incorporation is termed the "classical" test by Herman J. Walker Jr., one of the foremost authorities on Friendship, Navigation and Commerce Treaties. Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am. J. Int'l L. 373, 382 (1956).

The Second Circuit held that "Article XXII(3) defines a company's nationality for the purpose of recognizing its status as a legal entity but not for the purpose of restricting substantive rights granted elsewhere in the

Treaty." *Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d 552, 557 (2d Cir.), *cert. granted*, 102 S.Ct. 501 (1981). However, that Court apparently ignored the first half of the pertinent provision. While the second part of the second sentence of Article XXII(3) does establish a corporation's legal status, the first part of that sentence specifically provides that companies incorporated within the jurisdiction of either of the countries "*shall be deemed companies thereof.* . . ." 4 U.S.T. at 2080. The Second Circuit failed to include the *first part* of this conjunctive sentence in its analysis and focused solely on the second part relating to the establishment of juridical status. The sentence must be read as a whole, and neither part ignored.[3] *See Spiess* v. *C. Itoh & Company (America), Inc.*, 643 F.2d 353, 364 (5th Cir. 1981) (dissenting opinion), *rehearing en banc granted*, 654 F.2d 302, *vacated*, 664 F.2d 480 (1981).

Article XXII(3) does not restrict all substantive Treaty rights. Sumitomo may invoke those substantive rights inuring to the benefit of United States subsidiaries of Japanese corporations;[4] Sumitomo may not, however, as a United States corporation, invoke those rights granted only to nationals of Japan or to Japanese corporations.[5]

---

[3] The dialogue between Messrs. Nagai and Bassin, two of the Treaty negotiators, is most peculiarly relied upon by Sumitomo in that it is completely irrevelant to the point at issue. Brief of Petitioner and Cross-Respondent at 38. That dialogue addresses only the meaning of "juridical status," set forth in the *second* part of the second sentence of Article XXIII(3) and makes no reference to the first part of that sentence. Department of State Dispatch No. 13 from U.S., POLAND, Tokyo, to Department of State, Washington, D.C., April 8, 1952, App. 136a, 143-44a (emphasis added).

[4] Article VII(4) of the Treaty provides that "controlled enterprises" shall "be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other party."

[5] Under the same reasoning advanced by Sumitomo, an Iranian subsidiary of a Japanese parent could do business in New York and invoke the protections of the Treaty afforded to Japanese corporations, as could any of its other branches. The ramifications would, indeed, be grave.

To allow Sumitomo to invoke rights specifically granted to different types of entities is to disregard the express language of the Treaty which distinguishes among "nationals", "companies" and "controlled enterprises." *See* Article VII(1), 4 U.S.T. at 2069; Article VII(4), 4 U.S.T. at 2070; Article VI(4), 4 U.S.T. at 2069.

This reading is consistent with the official view of the operative provision when originally adopted. Thus, in discussing the history behind the inclusion of corporations in commercial treaties, Herman J. Walker, Jr. stated that:

> when commercial treaties . . . [began] evidencing concern with corporations as a class, the provisions made for their rights were not only set apart from, but were for many years strictly limited as compared with the provisions made for individuals. *The now established official view, accordingly, is that in general corporations are not deemed to be within the purview of a commercial treaty except as there may be express provision to that effect.*

Walker, *Provisions on Companies in United States Commercial Treaties, supra* at 378 (emphasis added and footnote omitted). Thus, the treatment accorded a particular type of entity is that stipulated in the Treaty and nothing more. *See* Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 Am. J. Comp. L. 229, 236 (1956).

The Treaty negotiators clearly contemplated that different types of entities would be granted different substantive rights.[6] Article VII(1) provides:

> *Nationals* and *companies of either Party* shall be

---

[6] Treaty provisions are careful to delineate between "controlled enterprises", "companies" and "nationals". Significantly, Article VII(4) provides:

> Nationals and companies of either Party, *as well as enterprises controlled by* such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.

4 U.S.T. at 2070 (emphasis added). *See also* Article VI(4), 4 U.S.T. at 2069.

> accorded national treatment . . . within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. . . . *Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall . . . be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.*

4 U.S.T. at 2069 (emphasis added).

The rights granted "controlled enterprises" (i.e. subsidiaries) are, contrary to the Second Circuit's suggestion, substantial. *Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d at 556. Under Article VIII(1), United States subsidiaries of Japanese corporations are to be afforded the same treatment as "like enterprises controlled by nationals and companies of such other Party." 4 U.S.T. at 2069. Thus, the United States subsidiary of a Japanese corporation has the same rights as every other corporation formed in the United States.

By the express terms of Article VIII(1), only Japanese nationals and companies, and not enterprises controlled by said nationals and companies, may invoke the right to engage executive personnel "of their choice."

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, . . . executive personnel, . . . of their choice.

4 U.S.T. at 2070. These Treaty provisions, specifically enumerating the entities to which certain rights are granted, make clear that Article VIII(1) was not intended to apply to United States subsidiaries of Japanese corporations. Granting rights to a corporation organized under the laws of Japan which are not granted to its United States subsidiary is wholly consistent with the Treaty's purpose of promoting international trade and investment.

> It is very reasonable that the two nations would reserve the most extraordinary degree of Treaty protection only for business enterprises created under their own laws, and would allow enterprises created under the laws of the other party to be subject to those laws on a basis equal to all other companies of that party.

Spiess v. *C. Itoh & Company (America), Inc., supra* at 369 (dissenting opinion).

Sumitomo erroneously contends that there is no substantive difference between a Japanese corporation which chooses to operate in this country through an American branch and a Japanese corporation which invokes our domestic law and chooses, instead, to operate through a wholly-owned United States subsidiary. Thus, it argues that the subsidiary should be able to assert, as can a branch office, the rights of its Japanese parent for purposes of Article VIII(1) and that "important legal consequences [should not] hinge on the foreign investor's choice of the form of enterprise by which it does business. . . ." Brief of Petitioner and Cross-Respondent at 41.

However, there are important legal consequences resulting from the choice of the form of enterprise. A foreign corporation operating through a wholly-owned U.S. subsidiary may not be considered to be "doing business" in the state to subject it to the state's jurisdiction. *See Delagi* v. *Volkswagenwerk AG of Wolfsburg, Germany,* 29 N.Y.2d 426, 328 N.Y.S.2d 653 (1972). *See also* W. Fletcher, 18A *Cyclopedia of the Law of Private Corporations,* § 8813 (1977).[7] Thus, while gaining the benefits of incorporating its subsidiary in New York, Sumitomo Shoji Kabushiki Kaisha, the parent of Sumitomo, remains im-

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[7] The parent corporation *will* be subject to the state's jurisdiction where the subsidiary is the agent of the parent, *Frummer* v. *Hilton Hotels International, Inc.,* 19 N.Y.2d 533, 281 N.Y.S.2d 41, *cert. denied,* 389 U.S. 923 (1967), or where the subsidiary is a mere instrumentality of the parent thus justifying a piercing of the corporate veil. *Taca International Airlines, S.A.* v. *Rolls-Royce, Ltd.,* 15 N.Y.2d 97, 256 N.Y.S.2d 129 (1965).

mune from the state's exercise of jurisdiction. The effect of this is to isolate the assets of the parent, as well as of its directors, from any liability imposed on the subsidiary. However, if the parent corporation chooses instead to operate through a U.S. branch ,it would be "doing business" in the state and would subject itself to liability.

Sumitomo argues that there are no important ramifications to the foreign investor's choice of the form of enterprise by which it chooses to do business for purposes of applying the Treaty rights, at the same time that the investor reaps the benefits of operating through a wholly-owned subsidiary rather than a branch office. Sumitomo cannot have it both ways. Judge Reavley, in *Spiess* v. *C. Itoh & Company (America), Inc., supra,* eloquently addressed this paradox:

> If a company of Japan wishes to safeguard a few superior legal rights under the Treaty, it may choose to do business in the form of a branch office. But if the Japanese company seeks to gain the additional tax and legal benefits that our laws confer on American-incorporated companies, they will create a separate legal entity under the aegis of American law. *The line between Japanese incorporation and American incorporation is a bright and distinct one. If Japanese investors choose to cross that line in order to gain all the benefits of our legal system on a basis equal with American corporations* [*it is*] *reasonable that they accept legal responsibilities and duties on an equal basis as well.*

643 F.2d at 369 (emphasis added) (dissenting opinion).

II.

Even If Sumitomo Could Invoke The Treaty, Its Hiring Practices Are Subject To Title VII Requirements

Even were the Second Circuit correct in determining that a United States subsidiary of a Japanese corporation

could invoke the Treaty, Sumitomo's hiring practices must nevertheless comply with the anti-discrimination provision of Title VII. As noted by the court below,

> [t]he right of Japanese firms operating in the United States under the Treaty to hire executives "of their choice" does not give them license to violate American laws . . . .

Avigliano v. *Sumitomo Shoji America, Inc., supra,* at 558. Thus, even if Sumitomo is deemed a "treaty trader", its hiring practices would nevertheless have to withstand the scrutiny of Title VII.

As this Court recognized in its seminal decision in *Whitney* v. *Robertson,* 124 U.S. 190, 194 (1888),

> [b]y the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control . . . .

Absent some indication of congressional intent to the contrary, then, this Court must construe the Treaty and Title VII so that the former is consistent with the latter.[8]

A. The Treaty and Title VII Are Not In Conflict

Sumitomo's sole claim to exemption from the strictures of Title VII is premised upon Article VIII(1) of the Treaty, which provides that "[n]ationals and companies

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[8] The apparent conflict between the Treaty and Title VII cannot be resolved by expanding the bfoq exception to Title VII. As discussed in Point III, *infra,* the Second Circuit's expansive reading of the bfoq provision emasculates the protections afforded by Title VII.

of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice". Sumitomo argues that these words "establish an *unqualified right* of foreign investors to employ 'executive personnel . . . of their choice' ", Brief of Petitioner and Cross-Respondent at 20 (emphasis added), and that application of Title VII to its hiring of executive personnel would result in "a significant derogation from FCN treaty rights", *id.* at 30.

Sumitomo, however, has distorted the purpose underlying Article VIII(1). Indeed, Sumitomo itself admits that it is not "exempt" from Title VII and that its hiring rights under the treaty are not "unqualified" in that Sumitomo admits that "matters of 'public health, morals and safety' are in any event reserved by the Treaty to the host country." Brief of Petitioner and Cross-Respondent at 27. It follows that a matter of such public morality as discriminatory hiring practices would be a matter reserved to the host country. Brief of Petitioner and Cross-Respondent at 14, 27. In fact, the background and negotiating history of the Treaty indicates not only that Article VIII(1) was intended to serve a more limited purpose than that advanced by Sumitomo but that the Treaty, when properly construed, is not in conflict with Title VII.

As Sumitomo itself has recognized, the central aim of the Treaty here, like all FCN treaties, is to give nationals and companies of the U.S. and Japan "the right to conduct business and commercial activities within the territory of the other *as freely as local citizens*". Brief of Petitioner and Cross-Respondent at 21 (emphasis added). As noted by Herman J. Walker, the chief architect of the post-war FCN treaties, Article VIII(1) assures treaty-trader companies "freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from *'percentile' restrictions* and the like. . . ." Walker, *Treaties for the Encouragement and Protection of Foreign*

Investment: Present United States Practice, 5 Am.J. Comp.L. 229, 234 (1956) (emphasis added).

To the same effect, Secretary of State Acheson, in amplifying upon a proposed FCN treaty with Uruguay, noted that the proposed Treaty "provides, for example, that citizens of one country may set up and operate business enterprises in the other *on the same footing* as citizens of that country". 21 Dep't State Bull. 909 (1949) (emphasis added).

Similarly, in connection with a proposed FCN treaty with West Germany, a Foreign Service dispatch from HICOG, Bonn to the Department of State comments on the limited purpose of provisions similar to Article VIII(1) by noting that the *"major special purpose is to preclude the imposition of 'percentile' legislation".* Foreign Service Dispatch No. 2529, from HICOG, Bonn, to Department of State, re FCN Treaty with Germany, dated March 18, 1954, App. at 182a (emphasis in original). The dispatch goes on to note that Article VIII(1) "gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law", *id.*

In short, Article VIII(1) merely serves to prevent "the imposition of ultra-nationalistic policies with respect to essential executive and technical personnel". Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am. J. Int'l Law 373, 386 (1956). It does not, however, affirmatively sanction discriminatory hiring practices.

Thus, far from granting treaty-trader companies an "unqualified" right to hire executives and other personnel, the Treaty here, like all FCN treaties, merely assures that treaty-trader companies will be accorded the same status as U.S. companies. Like their U.S. counterparts, treaty-trader companies may hire executives and supervisory personnel "of their choice," unfettered by quota restrictions and percentile requirements so long as their deci-

sions can be justified by reference to valid business goals and are non-discriminatory. Far from conflicting with Title VII, the Treaty, in effect, advances the goals of U.S. civil rights legislation: non-discriminatory merit hiring based upon legitimate business needs.

Furthermore, this interpretation of the Treaty is consistent with the Department of State's own pronouncements on the issue. In a letter addressed to the General Counsel of the Equal Employment Opportunity Commission, for example, the Deputy Legal Adviser to the Department of State indicated that the phrase "of their choice" should not be read "as insulating the employment practices of foreign companies from all local laws . . . [and] we [the Department of State] do not believe that it confers any right to discriminate against a particular sex, religious, or minority group". Letter of Lee R. Marks, Deputy Legal Adviser, U.S. Department of State to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission dated October 17, 1978, App. at 95a.

Given the underlying purpose of Article VIII(1)—to prevent the imposition of "ultra-nationalistic" quotas on the hiring of key executives by Japanese treaty-traders—as well as the Department of State's own interpretation of this provision, Sumitomo's construction must be rejected. Sumitomo's claim to an "unqualified" right to hire executive and supervisory personnel is neither required, given the text of the Treaty, nor persuasive, given the history of this and similar provisions.

B. The Construction Advanced By *Amici* Would Not Result in "Administrative Duplication, Confusion and Conflict"

The application of Title VII to Sumitomo's employment practices would not, as Sumitomo claims, create "a maze of administrative duplication, confusion and conflict. . . ." Brief of Petitioner and Cross-Respondent at 32. To the contrary, application of Title VII to

Sumitomo's hiring practices would impose no greater burden on Sumitomo than that imposed upon U.S. corporations—to carry out hiring decisions in a nondiscriminatory fashion. Indeed, if Title VII is not applied to the hiring decisions in question, Sumitomo will be permitted to evade the obligations imposed upon all other U.S. corporations, and its hiring decisions will be free of scrutiny by any regulatory body.

Sumitomo's argument on this point confuses two fundamentally distinct bodies of law and regulations. While the State Department, pursuant to the Immigration and Nationality Act, is charged with the duty of regulating the *entry* of treaty-trader aliens into this country, the employment practices of treaty-trader companies, once active within this country, including their hiring decisions regarding supervisory and executive personnel, is governed in part by Title VII. The application of Title VII to the employment practices here at issue involves considerations irrelevant to, and thus noticeably absent from, the regulations concerning the entry of treaty-traders into the United States.

In spite of the above, Sumitomo maintains that its view of the meaning of Article VIII(1) employment rights is "borne out by the legislative and administrative implementation of FCN treaty provisions by the United States". Brief of Petitioner and Cross-Respondent at 28. In support of this claim, Sumitomo argues that the regulation touching upon the eligibility of aliens for treaty-trader visas, 22 C.F.R. § 41.40(a) (1981), demonstrates the "linkage between the entry right and sojourn rights provided by Article I(1) [of the Treaty] and the employment right of Article VIII(1) . . . ." *Id.* The absence of any requirement in § 41.40(a) that a treaty-trader advance some basis for its decision to hire only Japanese citizens for executive and supervisory positions, however, indicates that the central concern of Title VII is never addressed under this regulation.

Section 41.40(a), in pertinent part, provides that an alien, in order to qualify for a visa as an employee of a treaty-trader company, must establish that he

> will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

22 C.F.R. § 41.40(a) at 150. While the State Department has elaborated on the indicia of the "executive or supervisory" positions which qualify for treaty-trader visa treatment (see Dep't of State Telegram No. 089624 to Japanese Posts, 4, reprinted in 58 Interpreter Rel. 478, 479 [Sept. 17, 1981] and Brief of Petitioner and Cross-Respondent at 29), both § 41.40(a) and the State Department's own policy statements concerning that section's implementation deal with the nature of the *duties* to be performed, rather than the basis for any individual *hiring decision.*

Thus, while a visa applicant employed in a "minor capacity" must prove that he possesses unique qualifications for the position in question, executive and supervisory personnel need not prove their credentials and must only establish that they have been hired to fill a position satisfying the State's Department's criteria. Both § 41.40(a) and the State Department's interpretation of that section are silent on the issue here presented: whether the nationality of an applicant for an executive or supervisory position constitutes a bona fide occupational qualification justifying discriminatory treatment. In short, once the State Department determines that the position to be filled is "executive" or "supervisory", it will not further scrutinize the employer's hiring procedures.

Given the limited nature of the determination undertaken by the State Department pursuant to § 41.40(a), no danger exists that application of Title VII to Sumitomo's decisions regarding the employment of executives will re-

sult in needless administrative duplication. While the State Department, pursuant to 22 C.F.R. § 41.40(a) (1981), is charged with determining whether an alien qualifies for an entry visa as a "treaty-trader", the concerns addressed by Title VII are separate and distinct. Title VII, along with the administrative and enforcement mechanisms it creates, furthers a public policy in no way addressed by the INA.

If the employment practices here in issue are exempt from Title VII review, the individual hiring decisions of hundreds of treaty-trader companies will be immune from all scrutiny. Merely by its designation of a position as "supervisory" or "executive", a treaty-trader company could effectively isolate itself from any claim of discriminatory hiring practices. If Sumitomo's position is adopted by this Court, decisions not reviewed by the State Department will be isolated from any review by the courts or the EEOC.[9]

Finally, application of Title VII to the employment practices here in issue would not constitute, as Sumitomo claims, judicial review of visa decisions. A finding by the district court, for example, that Sumitomo impermissibly discriminates on the basis of national original cloaked as "alienage", would in no way invalidate or call into question the visa decisions of the State Department. This is because the federal court would be examining an issue

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[9] Indeed, all "executive" and "supervisory" positions filled by non-Japanese nationals would also be immune from Title VII scrutiny, if Sumitomo's interpretation of the Treaty is adopted by this Court. While the entry of individual supervsory and executive personnel into this country is controlled by the State Department pursuant to 22 C.F.R. § 41.40(a), the Treaty does not *require* a treaty-trader to fill all "executive" and "supervisory" positions with Japanese nationals. If Sumitomo's position is adopted by this Court, however, a treaty-trader company's employment decisions concerning these positions would be immune from Title VII attack. This expansive reading of the "of their choice" language of the Treaty, which is implicit in Sumitomo's argument, is clearly at odds with the rules of construction adopted by this Court in *Whitney* v. *Robertson, supra.*

never considered by the State Department's consular officials—i.e., the bona fide occupational qualifications for "executive" or "supervisory" positions, including whether national origin, in the guise of alienage is being used as a job qualification and, if so, whether the former is a bona fide occupational qualification for the executive and supervisory positions in question. For this reason, the policy considerations advanced by this Court in *Mathews* v. *Diaz*, 426 U.S. 67 (1976), and *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), are simply inapposite.

In short, the expansive reading of the Treaty advanced by Sumitomo must be rejected. Neither the language of the Treaty itself, nor the purposes underlying Article VIII(1), requires adoption of that extreme position. Furthermore, a ruling by this Court exempting Sumitomo's hiring decisions concerning executive and supervisory personnel from Title VII scrutiny would create a vacuum in United States civil rights enforcement. Such an exemption is not required in order to give effect to FCN treaty rights, and would do severe damage to the policies underlying Title VII.

III.

BFOQ Is A Very Narrow Exception To Title VII's Discrimination Ban

Title VII's broad prohibitions against employment discrimination are qualified by Section 703(e), 42 U.S.C. § 2000e-2(e), which provides that,

> [n]otwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the

> normal operation of that particular business or enterprise . . . .

The Equal Employment Opportunity Commission and the courts, including this Court, have uniformly recognized that the bfoq exception is as narrow as a needle's eye. The court below, however, while giving lip service to the narrowness of the exception, has nevertheless construed it with a breadth undermining Title VII's objectives. The Second Circuit held:

> Although the BFOQ exception of Title VII is to be construed narrowly in the normal context, *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1977), we believe that as applied to a Japanese [sic] company enjoying rights under Article VIII of the Treaty it must be construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese [sic] company doing business in the United States. . . .

638 F.2d at 559.

The Second Circuit erred in so holding. As argued in Point I *supra*, Sumitomo is not entitled to claim any right under Article VIII(1) of the Treaty "to engage . . . executive personnel . . . of [its] choice." However, even assuming Sumitomo could claim the right to hire personnel of its choice, that right would not permit it to discriminate in violation of Title VII. See Point II, *supra*.

The Second Circuit's expansive construction of the bfoq exception is unnecessary to give "due weight" to the "unique requirements of a Japanese company doing business in the United States". Title VII's bfoq provision in its "normal context" allows for consideration of a company's particular nature and its special employment requirements. To distort Title VII's bfoq so as to reflect Treaty concerns would inevitably open the door to an unwarranted expansion of the bfoq exception, the operation of which must be confined to those narrow circumstances it was designed to address.

The guidelines promulgated by the EEOC are unambiguous:

> The exception stated in Section 703(e) of Title VII, that national origin may be a bone fide occupational qualification, shall be strictly construed.

29 C.F.R. § 1606.4 at 141 (1981).

Although we have found no cases in which a Title VII defendant has asserted a bfoq defense based on national origin, sex as a bfoq has been litigated with some frequency and been uniformly found insufficient as a defense to a Title VII discrimination claim except in those special cases where privacy or safety interests were implicated. The case law makes it clear that the factors to which the Second Circuit adverted are insufficient to establish that defense. Sumitomo's claim, advanced for the first time in this Court, that it engages in legal "nationality" discrimination, not proscribed "national origin" discrimination, must be rejected, since it is based on an apparent misreading of this Court's decision in *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86 (1973).[10]

A. The Court Of Appeals Erred In Suggesting That Japanese Linguistic Skills And The Like Can Render Japanese National Origin A BFOQ

The Court of Appeals for the Second Circuit suggested that Sumitomo might establish entitlement to a "national

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[10] *Espinoza* v. *Farah Mfg. Co., Inc.*, 414 U.S. 86 (1973), does establish the proposition that employment discrimination favoring United States citizens is not unlawful under Title VII. But *Espinoza* does not address the question of the legality or illegality of discriminating *against* United States citizens, precisely those persons Title VII was designed to protect.

In any event, even if *Espinoza* could be read broadly to remove from Title VII's scope all discrimination based on alienage or nationality, whether such discrimination is in favor of or against United States citizens, *Espinoza* itself recognizes that "an employer might use a citizenship test as a pretext to disguise what is in fact national-origin discrimination. Certainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin." *Id.* at 92. Sumitomo's "Japanese citizens only" rule undoubtedly has the proscribed effect; that rule therefore violates Title VII.

origin" bfoq by proving that the employment positions at issue required "(1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs, and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan. . . ." 638 F.2d at 559. None of these qualifications, however, require Japanese citizenship or Japanese national origin.

Amici do not dispute that Japanese language skills and knowledge of Japanese business may well be legitimate qualifications for the jobs at issue or that such qualifications may most often be found in persons of Japanese ancestry or nationality. *Amici* maintain, however, that neither Japanese citizenship nor ancestry constitutes a bfoq. To recognize a bfoq here would be to seriously misconstrue the nature of Title VII and of the bfoq defense.

Title VII was designed specifically to end the practice of employment decisions premised on stereotypical or overgeneralized conceptions of members of particular sexual, racial, religious or national origin groups. *Dothard* v. *Rawlinson,* 433 U.S. 321, 328 (1977). Under Title VII, employment decisions must be based on the specific qualifications of individuals, not on general qualifications or characteristics which correlate those individuals with particular population groups, even where such correlations are high. For example, although some jobs may require physical strength most frequently possessed by men, sex is nevertheless not a bfoq for positions requiring physical strength. *See, e.g., Weeks* v. *Southern Bell Tel. & Tel. Co.,* 408 F.2d 228, 235 (5th Cir. 1969); *Long* v. *Sapp,* 502 F.2d 34 (5th Cir. 1974).

Similarly, that Japanese linguistic skills may be more common to Japanese than others does not mean that there is a valid bfoq in Japanese nationality. It is the *language* skill which is a bona fide occupational qualification, not the Japanese passport. The Second Circuit's holding to the contrary misunderstands and unnecessarily expands the

bfoq defense, and, in so doing, vitiates Title VII's goal—the outlawing of empolyment decisions based on group stereotypes rather than on individualized considerations.

B. Customer Preference Cannot Create a BFOQ

The Second Circuit also erred in suggesting that customer preference may create a bfoq. Except in those special cases where privacy interests were implicated, customer preference has uniformly been found an insufficient defense to a Title VII discrimination claim. No special rules exist, nor should exceptions be created, for the discriminatory preferences of foreigners.

The question of customer preference is nowhere addressed in the national origin discrimination regulations, although it is discussed and rejected[11] in the sex discrimination guidelines. 29 C.F.R. § 1604.2 (1979).

The EEOC has steadfastly refused to recognize the preferences of co-workers, the employer or customers as justification for sexually discriminatory employment practices.[12]

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[11] The only time that sex may constitute a bfoq is "[w]here it is necessary for the purpose of authenticity or genuineness . . . *e.g.*, an actor or actress." 29 C.F.R. § 1604.2(a)(2).

[12] Thus, in a 1971 Commission case, an employer refused to promote a female to the position of branch manager because the job involved accompanying male customers to football games, dinners and hunting trips, arguing that customers would not go on hunting trips with female managers "unless they were built like Raquel Welch." The Commission rejected the defense. EEOC Dec. No. 71-2338, (CCH) EEOC Decisions (1973) ¶ 6247 at 4437. In a similar case, an employer refused a female applicant employment as an armored car guard, arguing that loss of customer confidence in the company's ability to provide security services justified a bfoq. The EEOC held that "this argument is, in law, without merit, since it presumes that customers' desires may be accommodated even at the price of rendering nugatory the will of Congress." EEOC Dec. No. 70-11, (CCH) EEOC Decisions (1973) ¶ 6025 at 4049.

Not only are the Commission's guidelines wholly consistent with the statutory language and legislative history, but the EEOC's construction of the statute is not particularly novel. New York State's Law Against Discrimination, originally enacted in 1945, Executive Law §296(1)(d) (McKinney 1981), was the first fair employment law in this country. It too had a bfoq exception. The Commission charged with enforcing that statute has repeatedly rejected asserted bfoq defenses based on the prejudices of third parties and maintained that:

> [T]raditional practices or the preferences of customers, employers and employees to deal or work with persons of a particular race, creed, color or national origin or the maintenance of a particular business atmosphere identified with a particular race, creed, color or national origin, will not as a general rule be deemed material to the existence of a bona fide occupational qualification.

See, e.g., New York State Commission Against Discrimination, Report of Progress at 18 (1964).

Congress determined that the bfoq exception of § 703(e) should apply *only* "in those certain instances" where "reasonably necessary" to the operation of that "particular enterprise." As the Fifth Circuit noted in *Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971):

> The care with which Congress has chosen the words to emphasize the function and to limit the scope of the exception indicates that it had no intention of opening the kind of enormous gap in the law which would exist if, [for example] an employer could legitimately discriminate against a group solely because his employees, customers, or clients discriminated against that group. Absent much more explicit language, such a broad exception should not be assumed for it would largely emasculate the act.

The legislative history *nowhere* suggests a looser reading of the statute. In fact, the Senate specifically rejected a proposed amendment to protect the employer's right to make hiring decisions based on its own business judgment. 110 Cong. Rec. 13825 (1964). *See generally,* Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification,* 55 Tex. L. Rev. 1025, 1027-30 (1977); *Wilson* v. *Southwest Airlines Co.,* 517 F.Supp. 292, 297-298 (N.D. Tex.1981).

A reading of the entire statute shows that its primary goal was to provide equal access to the job market regardless of religion, sex or national origin. The expansive construction of Section 703(e) suggested by the Second Circuit would permit the exception to swallow the rule. *See Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542, 545 (1971) (Marshall J., concurring).

This Court has, of course, already recognized the narrowness of the bfoq exception and the validity of the EEOC's guidelines. In *Dothard* v. *Rawlinson, supra,* 433 U.S. at 334 (footnote omitted), the Court said:[18]

> We are persuaded . . . by the restrictive language of § 703(e), the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.

Relatively few cases have directly addressed the question of whether co-worker, employer or customer prefer-

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[18] At issue in *Dothard* was an Alabama regulation which precluded the hiring of women for contact positions in maximum security prisons. Although this Court upheld a bfoq defense, its decision was based on the particular nature of the prison, characterized by "rampant violence" and a "jungle atmosphere", 20 percent of whose inmates were sex offenders.

ence may give rise to a bfoq under Title VII. The leading case is *Diaz, supra,* where the Fifth Circuit properly rejected an airline's refusal to hire males as flight cabin attendants because of its passengers' preference for female stewardesses.

> While we recognize that the public's expectations of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.

442 F.2d at 389.

It is only in those limited circumstances where strong privacy interests are present that customer preferences have been permitted to establish a bfoq.[14]

There is no reason to create a special exception to the rule where the customer, employer, or co-worker preferences asserted are those of foreign nationals. In fact, that contention was unambiguously rejected by the Court of Appeals for the Ninth Circuit in *Fernandez* v. *Wynn Oil Co.,* 653 F.2d 1273 (9th Cir. 1981).

In that case, Fernandez charged that she was denied a promotion to the position of Director of International Operations because of her sex. The employer defended by asserting, *inter alia,* that the position involved doing busi-

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[14] Thus, in *Fesel* v. *Masonic Home of Delaware, Inc.,* 447 F. Supp. 1346 (D.Del. 1978), *aff'd without opinion,* 591 F.2d 1334 (3d Cir. 1979), a bfoq defense was upheld against a male nurse who sought a job at a residential nursing home because of the preference given to its female patients' privacy interests and the intimate nature of the duties to be performed. *See also Backus* v. *Baptist Medical Center,* 510 F. Supp. 1191 (E.D. Ark. 1981); *Iowa Dept. of Social Services* v. *Iowa Merit Emp. Dept.,* 261 N.W. 2d 161, 16 FEP Cas. 923 (Iowa 1977). The privacy interests found sufficient to justify an exception to the rule that customer preference cannot create a bfoq are, of course, totally absent in the instant case.

ness in Latin America where the cultural mores worked against acceptance of a woman. The Ninth Circuit held:

> [S]tereotypic impressions of male and female roles do not qualify gender as a BFOQ. Nor does sterotyped customer preference justify a sexually discriminatory practice [citing *Diaz, supra*]. Furthermore, the Equal Employment Opportunity Commission has held that the need to accommodate racially discriminatory policies of other nations cannot be the basis of a valid BFOQ exception. EEOC Decision No. 72-0697, CCH EEOC Decisions 1971, ¶ 6317, at 4569. . . .
>
> Wynn attempts to distinguish *Diaz*, by asserting that a separate rule applies in international contexts. Such a distinction is unfounded. Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign nation can compel the non-enforcement of Title VII here.

653 F.2d at 1276-1277 (footnote and citations omitted).

The *Fernandez* holding is plainly correct. The validity of employment practices in the United States must be measured against the commands of Title VII, and not the cultural biases entertained by persons outside the United States.

Cultural biases of foreigners, no matter how intractable, cannot excuse discriminatory conduct in this country. As a matter of statutory public policy, the United States cannot allow the attitudes of foreign nationals to justify discriminatory practices within its borders.

The Arab boycott, of course, presents the clearest example of an attempt by other nations to impose their cultural biases on businesses subject to American anti-discrimination laws. American companies which have ac-

ceded to such pressure have not successfully asserted foreign coercion as a defense to charges of employment discrimination.

American Jewish Congress v. *Carter*, 23 Misc.2d 446, 190 N.Y.S.2d 218 (Sup. Ct. N.Y. 1959), *modified*, 10 A.D. 2d 833, 199 N.Y.S. 2d 157 (1st Dept. 1960), *aff'd*, 9 N.Y.2d 223, 213 N.Y.S. 2d 60 (1961), involved a complaint against the Arabian-American Oil Company ("Aramco"), charging it with violation of New York State's Law Against Discrimination in inquiring into the religion of job applicants.

The employer in that case was not faced with mere religious preferences and cultural biases of the Saudi Arabians with whom it sought to do business. Rather, the undisputed facts were that Saudi Arabia both prohibited the employment of Jews in that country and "strenuously objects to the employment of Jews in any part of Aramco's operation." 23 Misc.2d at 448.

The New York Supreme Court, in the strongest possible language, rejected Aramco's defense that religion was a bfoq.

> *This court does not pretend to assert that Saudi Arabia may not do as it pleases with regard to whom it will employ within the borders of Saudi Arabia. Nor does this court pretend to say that Aramco may not hire whom it pleases to conform to its Arab master's voice. What this court does say is that Aramco cannot defy the declared public policy of New York State and violate its statute within New York State no matter what the King of Saudi Arabia says. New York State is not a province of Saudia Arabia, nor is the constitution and statute of New York State to be cast aside to protect the oil profits of Aramco.* Nor will the fact, if it be such, that the employment is for possible service in Saudi Arabia

> permit the subversion of our State law aimed to preserve our democratic heritages.

23 Misc.2d at 448-449 (emphasis in original).

> No foreign nation may dictate the nonenforcement of a valid State law. . . . *An engineer who is Jewish is no less an engineer by being so—and no cavalier attempt to classify him as not having a "bona fide qualification" because he is Jewish will be countenanced by this court.*

Id. at 450 (emphasis in original).

Title VII, the wording of which is similar to New York State's anti-discrimination law, mandates the same result. Indeed, the United States Department of Justice has taken the position that employment discrimination attributable to the Arab boycott is actionable under Title VII. *See* Lewin, *Domestic Civil Rights Aspects of the Boycott,* in *Transnational Economic Boycotts & Coercion* at 91 (R. Mersky ed. 1978).

Thus, even where official governmental policies of foreign states encourage or compel discriminatory hiring practices as the price of doing business there, such policies, and economic coercion based upon those policies, do not provide a defense to discrimination which is outlawed by Title VII. *A fortiori,* mere cultural biases and predelictions of foreigners with whom a company doing business *here* seeks to do business and which do not, in any sense, raise serious questions of governmental foreign policy, cannot render sex, religion, or national origin bona fide occupational qualifications.

Sumitomo, a U.S. subsidiary of a Japanese corporation, has chosen to do business in the United States. It cannot now be heard to assert that "those persons with whom (it) does business" prefer to deal only with Japanese and thus that Japanese citizenship is a bona fide occupational qualification. The Second Circuit's suggestion to the contrary must therefore be rejected.

Conclusion

For the reasons set forth above, the *amici* respectfully submit that this Court should affirm the ruling below refusing to dismiss plaintiffs' Title VII claims, because:

1. Sumitomo has no standing to claim the Treaty right to engage personnel of its choice, or alternatively

2. the Treaty right to engage personnel of its choice does not include the right to discriminate in violation of Title VII.

This Court should further hold that no special or expansive bfoq exception exists for companies claiming rights under the Treaty and that the factors mentioned by the court below as relevant to the existence of a bfoq are, as a matter of law, insufficient to establish a bfoq defense.

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* We gratefully acknowledge the assistance of Carrie W. Teitcher, a law school graduate awaiting admission to the New York Bar, in the preparation of this brief.

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No. 80-2070
No. 81-24

IN THE

Supreme Court of the United States

October Term, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner and Cross-Respondent,

against

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,
Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brief Amicus Curiae of the Attorney General of the State of New York

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Questions Presented.

1. Does Title VII of the Civil Rights Act of 1964 limit the right of Japanese companies operating in the United States through American subsidiaries to employ "executive personnel * * * of their choice," as provided by the Treaty of Friendship, Commerce and Navigation between the United States and Japan?

2. Assuming *arguendo* that the American subsidiary of a Japanese corporation enjoys freedom of choice in employment rights under the Treaty, is customer preference a valid factor warranting application of Title VII's narrow "bona fide occupational qualification" exception?

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No. 80-2070
No. 81-24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

SUMITOMO SHOJI AMERICA, Inc.,

Petitioner and Cross-Respondent,

against

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief *Amicus Curiae* of the Attorney General of the State of New York.

The Attorney General of the State of New York submits this *amicus curiae* brief pursuant to Rule 36(4) of the Rules of this Court to insure the fullest possible implementation of Federal civil rights law in this State.

This matter involves a challenge to the employment practices of Sumitomo Shoji America, Inc. (hereafter "Sumitomo"), a wholly-owned subsidiary corporation located in New York, incorporated under New York law and employing primarily New York residents. New York's interest in this case, however, goes far beyond its responsibility to protect its residents from discrimination by Sumitomo. This Court can take judicial notice of the fact that New York State's population is tremendously heterogeneous, since New York City has long been the point of entry for immigrants from virtually every nation on earth. Perhaps because of this diverse population New York enjoys a long tradition of civil rights legislation. Its own Civil Rights Law, enacted in 1909, was the first comprehensive statute of its kind in the nation, insuring the protection of the civil rights of all New York residents.

Because of this tradition, embodied in various civil rights statutes, the State of New York has taken an active role in the struggle to eradicate employment discrimination on the basis of race, religion, national origin or sex. The continued vitality of Title VII of the Civil Rights Act of 1964, with which New York's Human Rights Law is closely interrelated, is crucial to that struggle.

Summary of Argument.

The Treaty of Friendship, Navigation and Commerce between the United States and Japan (hereafter "Treaty") does not grant Japanese corporations a license to ignore American laws prohibiting employment discrimination. The right of such corporations under the Treaty to employ

executive personnel of their choice is subject to the same limitations imposed upon the employment practices of American corporations by Title VII of the Civil Rights Act of 1964.

By including customer preference as one factor determinative of Title VII's "bona fide occupational qualification" exception, the Court below has effected an unwarranted expansion of this narrow exception which could seriously undermine Title VII's purposes. This expansion is not only unwarranted by the facts of this case, but is also contrary to both established judicial precedent and the guidelines promulgated by the Equal Employment Opportunity Commission concerning the bona fide qualification exception.

Nature of the Case.

The petitioner, Sumitomo, incorporated under the laws of the State of New York, is a wholly-owned subsidiary of a Japanese trading company. It is engaged primarily in the sale and resale of goods in import and export markets. The cross-petitioners, with one exception, are United States citizens and past or present female clerical employees of Sumitomo.

In this action, cross-petitioners claim that Sumitomo's admitted practice of placing only male Japanese nationals in executive, managerial and/or sales positions constitutes discrimination on the basis of sex and national origin, in violation of Title VII of the Civil Rights Act of 1964 (42 USC, § 2000e, *et seq.*). The petitioner asserts that its employment practices are protected by what it characterizes as an "unqualified" Treaty right to employ "executive personnel * * * of their choice".

ARGUMENT.

POINT I.

The Treaty right of Japanese companies operating in the United States to employ executive personnel of their choice is not absolute, but subject to the same employment discrimination prohibitions applicable to American corporations under Title VII of the Civil Rights Act of 1964.

Section 703(a) of Title VII of the Civil Rights Act of 1964 provides in part:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; * * *"

Article VIII(1) of the Treaty provides:

> "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, * * * executive personnel * * * and other specialists of their choice."

The petitioner asserts that this provision confers upon Japanese companies operating in the United States an "unqualified right" to employ "executive personnel * * * of their choice", undiminished by Title VII's prohibition against discrimination in employment (Pet Br, p 20). This argument is premised upon what petitioner perceives to be a fatal inconsistency between its Treaty right to freedom

of choice in employment and Title VII's prohibition against discrimination. Viewing the Treaty and statute as irreconcilable, petitioner cites well-established authority holding that, absent express statutory language, Courts will not imply legislative abrogation of Treaty rights (Pet Br, p 31).

It is equally well-settled, however, that "[w]hen there are two acts and treaties upon the same subject, the rule is to give effect to both if possible" (*United States v. Borden Co.*, 308 US 188, 189 [1939]). Applying this principle, we submit that the express language of the Treaty in its entirety is easily harmonized with Title VII.

As the Court below recognized (638 F2d at 554), the overriding purpose of this and other Friendship, Commerce and Navigation treaties is to insure that foreign corporations doing business in this country receive the same treatment as American citizens. Thus, Article VII(1) of the Treaty guarantees that "companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other activities within the territories of the other Party". Accordingly, the Treaty provides that such companies "shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party".

When this purpose is read in conjunction with Article VIII(1), there is no conflict with Title VII. The Treaty merely guarantees Sumitomo and other Japanese companies doing business in America the same freedom of choice enjoyed by United States corporations. Sumitomo

is free to hire any employee it chooses, as long as it does not unlawfully discriminate in the process.*

This conclusion is reinforced by an examination of the background of the Treaty, as set forth by the Court below (638 F2d at pp 558-559). Citing documents relating to the Treaty's formulation, that Court noted that Article VIII's "freedom of choice" provision was "primarily intended to exempt companies operating abroad from local legislation restricting the employment of noncitizens" *(id.)*. Thus, Article VIII was intended to eliminate discrimination, not, as petitioner ironically argues, to give foreign corporations license to violate the anti-discrimination laws of their host countries.

POINT II.

The Court below erred in holding that customer preference can be determinative in establishing a "bona fide occupational qualification" (bfoq) exception under Title VII, since such an unwarranted expansion of this narrow exception could seriously undermine the statute's purpose.

The broad prohibitions against employment discrimination contained in section 703(a) (1) of Title VII are qualified by section 703(e), which provides that:

*Petitioner argues in the alternative that even if Title VII were fully applicable, its employment practices do not violate that statute, since they are based on Japanese citizenship, not national origin (Pet Br, pp 14-18). This argument is based on an overly-expansive reading of this Court's decision in *Espinoza v. Farah Manufacturing Co.*, 414 US 86 (1974). Although this Court did hold in *Espinoza* that citizenship discrimination is not illegal *per se* under Title VII, it went on to state unequivocally that "Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin" (*id*, p 92). The Court below did not pass upon this issue. It is clear, however, that petitioner's claim must at least be subject to scrutiny at trial upon remand to determine if in fact its employment practices have the purpose or effect of national origin discrimination.

> "(1) [n]otwithstanding any other provision of this sub-chapter it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of religion, sex or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * * (42 U.S.C. §2000e-2[e])"

The Court below held that petitioner was subject to the constraints of Title VII and correctly observed that petitioner could avail itself of the bfoq exception by establishing that the employment of Japanese nationals was "reasonably necessary to the successful operation of its business" (638 F2d at p 559). It further stated, however, that, as applied to petitioner, an unprecedented expansion of this exception was justified by "Treaty rights and unique requirements of a Japanese Company doing business in the United States" *(id.)*. Thus, the Court included "acceptability to those persons with whom the company or branch does business" as one of the factors determinative of the bfoq exception. This expansion of the bfoq exception to include customer preference is contrary to established precedent and could seriously erode the effectiveness of Title VII.

This Court has ruled in *Dothard v. Rawlinson,* 433 US 321, 334 (1977), "that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination based on sex." Heeding this admonition, Federal courts have long held that customer preference is not a defense to an employment policy which makes a distinction upon impermissible grounds (see, e.g., *Fernandez v. Wynn Oil Company,* 653 F2d 1273 [9th Cir, 1981]; *Diaz v. Pan American Airways, Inc.,* 442 F2d 385 [5th Cir, 1971], cert den 404 US 950 [1971]).

Fernandez, supra, is most apposite to the case at bar, for there the corporation, an international petro-chemical manufacturer, argued for a relaxation of the bfoq exception to include customer preference in international contexts. This argument was flatly rejected by the Ninth Circuit, which stated (*id,* p 1277):

> "Such a distinction is unfounded. Though the United States cannot impose standards of non-discriminatory conduct on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. *No foreign nation can compel the non-enforcement of Title VII here."* (Emphasis supplied.)

The troubling implications of accepting the unprecedented expansion of bfoq to include customer preference could well extend far beyond the context of this case. Surely the restaurant owner who avers in offering a bfoq defense that his customers will not eat food served by black hands will be summarily dismissed from every court in this land. Yet the decision of the Court below would open the door to such future challenges to Title VII.

Acknowledgement of the legitimacy of customer preference as an excuse for employment discrimination would not only be a fatal first step in curtailing the effectiveness of Title VII, it is also directly contrary to the EEOC guidelines concerning the bfoq exception in both sex and national original contexts. Those guidelines provide:

> "(1) The commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:
>
> * * *

"(ii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in paragraph (a) (2) of this section.

"(2) Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress. (29 CFR § 1604.2)

* * *

"The exception stated in Section 703(e) of Title VII, that national origin may be a bona fide occupational qualification, shall be strictly construed. (29 CFR § 1606.4)"

The EEOC has resolutely adhered to these guidelines,* and this Court has repeatedly held that they are entitled to great weight (*Dothard v. Rawlinson, supra,* 433 US 321, 334 n 19; *General Electric v. Gilbert,* 429 US 121, 142-43 [1976]; *Griggs v. Duke Power Co.,* 401 US 424 [1971]). The EEOC's interpretation of the bfoq exception is reasonable and sensitive to the purposes of Title VII; nevertheless, the Court below has without explanation disregarded its narrow construction of this exception.

*For example, in a case in which an employer refused to hire a woman who applied for a position as an armored car guard, the EEOC rejected the argument that loss of customer confidence in the employer's ability to provide adequate security should justify a bfoq exception. EEOC Decision No. 70-11, 1973 EEOC Dec 4048 (1969). Similarly, the preference of male customers for male employees to accompany them to football games and hunting trips and the preference of wives that their husbands not work with single women in situations requiring sleeping or working in close quarters were held by the EEOC to be insufficent to establish a bfoq defense. EEOC Decision No. 71-2338, 1973 EEOC Dec 4437 (1971); EEOC Decision No. 72-0644, 1973 EEOC Dec 4565 (1971).

This break with established precedent and administrative interpretation is unwarranted by the facts of this case, and, indeed, was not even urged by petitioner in the courts below. The Court of Appeals states that Article VIII of the FCN Treaty and the "unique requirements of a Japanese company doing business in the United States" account for the expansion of the bfoq exception to include customer preference.

Concerning its "unique requirements", however, petitioner's attorney stated in an affidavit in support of the motion to dismiss in the District Court only (Joint App, p 70a):

> "Thus, it is imperative that the managers, executives and 'traders' (a more appropriate term than 'salesperson' for the functions performed by those who buy and sell goods for a *sogo shosha*) comprehend sophisticated questions of international finance, international investment, international trade, shipping and related business matters, as well as local and foreign potential market conditions for a wide variety of products—chemicals, fertilizers, steel products, machinery, industrial plans, textiles, airplane parts, rubber raw materials, energy, ceramics, etc. It is equally imperative that such persons, whether working for the parent corporation or for its branches, representative offices or subsidiaries, intimately comprehend the Japanese marketplace and Japanese business practices, culture and language."

Noticeably absent from this detailed list is "acceptability to those persons with whom the company or branch does

business," the standard enunciated by the Court below. Thus, while the Second Circuit asserts that its standard is necessary to accommodate the unique situation of Sumitomo, the company itself has never contended that accommodation to its customers' preferences is given weight in determining whom it employs in a management capacity.

Furthermore, Sumitomo's list of imperative qualities does not recognize either citizenship or sex, and no reasonable argument can be made that other-than-Japanese citizens or females are incapable of acquiring the skills Sumitomo requires in its management employees.

Upon remand, therefore, the District Court should be instructed that any bfoq exception alleged by Sumitomo be evaluated in light of its historically narrow construction, and that acceptability of employees to business associates or customers is not a proper factor in evaluating the applicability of that exception.

CONCLUSION.

The decision of the Court of Appeals should be modified to eliminate customer preference as a determinative factor in the bfoq exception, and as so modified affirmed.

Dated: Albany, New York
February 20, 1982

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Nos. 80-2070, 81-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner & Cross-Respondent,
v.
LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,
Respondents & Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE C. ITOH & COMPANY (AMERICA), INC. IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner & Cross-Respondent,
v.
LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,
Respondents & Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE C. ITOH & COMPANY (AMERICA), INC. IN SUPPORT OF PETITIONER

INTRODUCTION

C. Itoh & Company (America), Inc. (hereinafter referred to as "C. Itoh"), with the written consent from counsel of all parties on file with this Court, submits this Brief as *Amicus Curiae* in support of Petitioner and Cross-Respondent Sumitomo Shoji America, Inc. (hereinafter referred to as "Sumitomo").

INTEREST OF AMICUS CURIAE

C. Itoh is a wholly-owned subsidiary of C. Itoh & Company, Ltd., of Japan and is organized under the laws of New York.

Like Sumitomo, C. Itoh is a Japanese trading company ("sogo shosha") engaged in substantial international trade between the United States and Japan. Its principal commercial activity involves arranging for the import to the United States of Japanese produced goods and services and the export to Japan of United States produced goods and services. C. Itoh functions as one component of a global trading system coordinated by its parent corporation.

This coordination is achieved through the assignment of Japanese nationals from the parent company to C. Itoh for purposes of management and control. Like Sumitomo, C. Itoh's managerial structure is composed of Japanese nationals assigned to it by its parent company for the purpose of carrying on trade between the United States and Japan. The Japanese staff personnel enter the United States as nonimmigrant "treaty traders" under the provisions of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101(a)(15)(E)(i)(1976). As a general rule, C. Itoh's Japanese managerial personnel remain in the United States for periods of between three and five years before returning to Japan to resume duties with the parent company. C. Itoh's practice of rotating its Japanese managerial staff is typical of other Japanese trading companies operating in the United States, such as Sumitomo.

In 1976, three white American plaintiffs brought suit against C. Itoh in the United States District Court for the Southern District of Texas, alleging that C. Itoh's staffing of management level positions with Japanese nationals constituted unlawful discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1976) (hereinafter referred to as "Title VII") and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976) (hereinafter referred to as "Section 1981"). The district court certified a nationwide class consisting

of all C. Itoh employees other than porters, secretaries and clerical personnel, who were not of Japanese national origin, not of yellow color, and not of the Oriental race.

In May 1978, C. Itoh filed its Motion to Dismiss on the grounds that Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan[1] reserves to C. Itoh the absolute right to fill all of its managerial positions with Japanese nationals. The district court denied this Motion, holding that C. Itoh was not entitled to invoke the protection of the Treaty because it was incorporated in the United States and therefore was not a "company of Japan" as defined in Article XXII(3) of the Treaty. The district court also declined to recognize the standing of C. Itoh to invoke the protection of the Treaty in behalf of its Japanese parent. *Spiess* v. *C. Itoh & Co. (America), Inc.*, 469 F. Supp. 1 (S.D. Tex. 1979).

On interlocutory appeal, the Fifth Circuit reversed, concluding that the clearly established intent of the parties to the Treaty was that companies such as C. Itoh "may assert all rights extended to 'companies of either party' by the Japanese Treaty." 643 F.2d 353, 358-59. The majority further ruled that the staffing privilege conferred upon such companies by Article VIII(1) of the Treaty was not limited to national treatment:

> Considering the Treaty as a whole, the only reasonable interpretation is that Article VIII(1) means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws.

Id. at 361.[2]

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[1] Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863. (hereinafter referred to as the "Japanese Treaty" or the "Treaty").

[2] On August 7, 1981, the Fifth Circuit ordered the case to be reheard *en banc*, thereby vacating the panel decision of April 24. 654 F.2d 302 (5th Cir. 1981). The panel decision was reinstated, however, by

As a direct beneficiary of the favorable trade and investment provisions of the Treaty, C. Itoh has a profound interest in assuring that the Treaty rights and privileges it has enjoyed over the past three decades are neither diminished nor altered as a result of this litigation.

SUMMARY OF ARGUMENT

1. A wholly owned United States incorporated subsidiary of a Japanese company such as Sumitomo has standing to raise the protection of the Treaty through its status as a company entitled to claim the benefits of the Treaty through Section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952 and the Rules and Regulations of the Department of State implementing the Immigration and Nationality Act. In addition, such a corporation has standing to claim the protection of the Treaty in behalf of its parent company, which is not a party to this litigation but which would be injured by a decision denying the protection of the Treaty to its wholly owned subsidiary.

2. The Department of State has consistently interpreted the Treaty to apply to wholly owned United States incorporated subsidiaries of Japanese corporations.

3. The Treaty created a right in behalf of Japanese companies to employ Japanese managerial personnel of their choice in United States incorporated subsidiaries engaged in carrying on trade between the United States and Japan. This Treaty right has not been modified or abrogated by Title VII or Section 1981.

4. The Treaty and United States civil rights laws may be harmonized by recognizing that the Treaty and the civil rights laws are predicated on different but complementary policies of the United States. If the Treaty right is to be modified, the proper forum for such modification is either Congress or the President.

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the Order of the Fifth Circuit on December 9, 1981, which vacated the previous order granting rehearing *en banc*.

ARGUMENT

I. A UNITED STATES INCORPORATED SUBSIDIARY WHOLLY OWNED BY A JAPANESE CORPORATION IS PROPERLY DEEMED A COMPANY OF JAPAN UNDER THE JAPANESE TREATY

A. A Treaty Is To Be Liberally Construed To Accomplish its Evident Purpose.

A fundamental principle of treaty interpretation is that a treaty is to be liberally construed to accomplish its overriding purpose. *See, e.g., Factor* v. *Laubenheimer,* 290 U.S. 276 (1933); *Nielsen* v. *Johnson,* 279 U.S. 47 (1929); *Geofroy* v. *Riggs,* 133 U.S. 258 (1890). Consistent with this principle of liberal construction, this Court has developed the following working maxim:

> [W]here a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred.

Hauenstein v. *Lynham,* 100 U.S. 483, 487 (1880). This maxim has been applied so consistently through the years that it is no longer subject to dispute. *See Factor* v. *Laubenheimer,* 290 U.S. 176 (1933); *Nielsen* v. *Johnson,* 279 U.S. 47, 52 (1929); *Asakura* v. *Seattle,* 265 U.S. 332 (1924); *Tucker* v. *Alexandroff,* 183 U.S. 424, 437 (1902); *Geofroy* v. *Riggs,* 133 U.S. 258, 272 (1890).

The Supreme Court has recognized the special importance of this maxim as applied to commercial treaties. The Court has traditionally construed commercial treaties in an expansive manner, both in determining the parties entitled to claim treaty protection and the means by which those parties exercise their treaty rights. *Kolovrat* v. *Oregon,* 366 U.S. 187 (1961); *Jordan* v. *Tashiro,* 278 U.S. 123 (1928).

B. The Design and Structure of the Treaty Clearly Establish that United States Incorporated Subsidiaries of Japanese Corporations Are Entitled to Claim Full Rights Under the Treaty.

The commercial treaty program is the oldest continuing economic program of the United States government.[3] The first treaty concluded with a foreign country is usually a treaty of friendship, commerce, and navigation ("FCN treaty"), which sets the framework in which economic relations can be conducted on a stable basis. Such an intention is clearly reflected in the Preamble to the 1953 Treaty with Japan, which refers to the promotion of "mutually advantageous commercial intercourse," the encouragement of "mutually beneficial investments," and the establishment of "mutual rights and privileges."

The Japanese Treaty was one of a new series of FCN treaties negotiated after World War II with greatly increased emphasis on the encouragement of American private investment abroad.[4] During the legislative hearings on the Japanese Treaty, Assistant Secretary of State for Economic Affairs Samuel C. Waugh, testified that the Japanese Treaty and companion FCN treaties were intended by the Department of State to secure for American nationals and corporations certain specific rights pertaining to investment and control over American enterprises abroad:

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[3] The first such treaty was with France in 1778. *See generally* Metzger, *Commercial Treaties of the United States and Private Foreign Investment*, 19 FED. B.J. 367 (1959); Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958).

[4] *See* "Commercial Treaties — Treaties of Friendship, Commerce & Navigation between the United States and Columbia, Israel, Ethiopia, Italy, Denmark, and Greece," *Hearings Before the Subcomm. of the Senate Comm. on Foreign Relations*, 82d Cong., 2d Sess. at 4 (1952) (hereinafter referred to as "1952 *Legislative Hearings*").

> *The object of the Department of State in negotiating treaties of this type is to facilitate the protection of American interests abroad.* . . . Such treaties facilitate the protection of American interests because they contain certain definite commitments with regard to specific rights. . . . Of *special concern to investors are such assurances as* those regarding rights to engage in extensive fields of business activity upon as favorable terms as the nationals of the country, *the right of the owner to manage his own affairs and employ personnel of his choice.* . . .

"Commercial Treaties — Treaties of Friendship, Commerce & Navigation, with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan," *Hearings Before the Subcomm. of the Senate Comm. on Foreign Relations,* 83d Cong., 1st Sess. at 2 (1953) (hereinafter cited as "1953 *Legislative Hearings*") (emphasis supplied).

The Japanese Treaty and its companion treaties contained several new provisions recognizing the widespread use of the corporate form of business. Such provisions granted companies the same rights as individuals in such important matters as establishing, acquiring, controlling, and managing the affairs of business enterprises. The basic purpose of these new provisions was "to safeguard the investor against the nonbusiness hazards of foreign operations."[5] As Deputy Assistant Secretary of State Linder testified:

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[5] *Id.* The particular importance of the Japanese Treaty was also emphasized in the testimony of U. Alexis Johnson, Deputy Assistant Secretary of State, Far Eastern Affairs, who informed the Senate Subcommittee on Foreign Relations that:

> The treaty with Japan is of particular significance because of the magnitude of present and potential United States investment in and trade with Japan. . . . The provisions of the treaty concerning investment creates a climate favorable to increased American investment in Japan under conditions of mutual benefit to both countries. . . . The establishment of conditions for the maintenance and expansion of United States — Japanese trade is, consequently, of considerable importance to both countries.

1953 *Legislative Hearings* at 27.

> [These hazards] assume many forms: inequitable tax statutes, confiscatory expropriation laws, *rigid employment controls*, special favors to state-owned enterprises, drastic exchange restrictions, and other discriminations against foreign capital.

1952 *Legislative Hearings* at 4 (emphasis supplied). Nowhere in Linder's testimony, or indeed in any other aspect of the legislative history of these treaties, is there any indication of a preference for one form of business enterprise over another.

Although the entire treaty is designed to facilitate commercial intercourse between the two countries, the provisions of primary importance to foreign investors are contained in Articles I, VII, and VIII.[6] Article VII, frequently described as the core of the Treaty,[7] authorizes nationals and companies of Japan to establish, manage, and control enterprises in the United States. Article VIII(1), an elaboration on the right to manage and control provided in Article VII(1), identifies the types of personnel that may be sent to the United States by a company of Japan to manage and control its investment. Article I(1) is an essential component of the Article VII(1) right to establish enterprises in the United States, because it identifies the purposes for which the categories of personnel listed in Article VIII(1) may enter the United States. Thus, the logical and functional interrelationship of these articles is clear.

The unitary structure of these articles was explicitly recognized by those who drafted and negotiated this series of

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[6] The rights granted by these provisions are of course reciprocal and are enjoyed by nationals and companies of the United States.

[7] Airgram from Secretary of State Acheson to U.S. Political Adviser, Tokyo, No. A-453, Jan. 7, 1952 (*see* Joint Appendix, hereinafter cited as "Jt. App.", 130a).

post-war FCN treaties.[8] The interrelationship of the entry provisions of Article I to Articles VII and VIII is manifest in a statement by Secretary of State Acheson describing the similar provisions in the FCN treaty with Uruguay:[9]

> [The treaty] provides for example that citizens of one country may set up and operate business enterprises in the other on the same footing as citizens of that country. *They will also be able to obtain entry into that country for managers and technicians from their own country who are needed in order to operate their enterprises effectively.*

21 DEP'T STATE BULL. 909 (1949) (emphasis supplied). Secretary of State Kissinger has reflected a similar understanding of the integral nature of Article I to Article VII in the Japanese Treaty. Telegram of Secretary of State Henry Kissinger to United States Embassy in Tokyo, No. A-105, Jan. 9, 1976, p. 2 (*see* Jt. App. 157a).

The rights of entry provided by Article I(1) are implemented through the provisions of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101 *et seq.* (1976). Section 101(a)(15)(E)(i) of the Act allows the admission into the United States of non-immigrant "treaty traders," who are aliens entering the country for the purpose of carrying on substantial trade pursuant to an FCN treaty. This section defines "treaty trader" in terms very similar to those of Article I(1)(a) of the Treaty.

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[8] *Id.* During the negotiations of the 1954 German FCN Treaty, 7 U.S.T. 1839, T.I.A.S. No. 3593, the United States representatives described the first sentence of Article VIII(1) as *"being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto* by emphasizing the freedom of management to make its own choices about personnel." Foreign Service Despatch No. 2529, from High Commissioner for Germany to Department of State. Mar. 18, 1954, p. 1 (*see* Jt. App. 181a) (emphasis supplied). *See also* Diplomatic Note from U.S. High Commissioner for Germany to the German Federal Ministry of Foreign Affairs, Dec. 15, 1953, p. 3 (*see* Jt. App. 254a) (interpreting Articles VII and VIII uniformly).

[9] S. EXEC. D., 81st Cong., 2d Sess. (1949).

Moreover, the implementing Department of State regulations require that a treaty trader employed by a foreign-owned company be

> engaged in duties of a *supervisory or executive character*, or if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

22 C.F.R. § 41.40(a) (emphasis supplied). This job level requirement is derived from the Article VIII(1) Treaty right to engage "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice."[10] Thus, the relationship between the Treaty and the treaty trader provisions of the Immigration and Nationality Act and its regulations is explicit.[11]

That treaty trader privileges are not limited by the form of the business entity involved is well documented in a State Department dispatch to the U.S. High Commissioner in Bonn, Germany:

> The basic purpose of the treaty trader provision and of the legislation which authorizes the extension by treaty of liberal sojourn privileges for purposes of trade is, of course, the promotion of mutually beneficial commercial intercourse between the parties to the treaty. *There is no intent thereby to attempt to regulate the particular form of business entity by which the desired trading activities are to be carried on.* Hence it is the practice in administering the treaty trader regulations to "pierce the corporate veil" and to authorize the issuance of treaty trader visas to qualified

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[10] This job level requirement has been a part of this regulation at least since the Treaty was signed in 1953. *See Matter of N.S.*, 7 I. & N. 426 (1957).

[11] Further evidence of the integrated relationship of the Immigration and Nationality Act and FCN treaties is found in Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 813 (1958).

> aliens from treaty countries whose trading activities in the United States would be carried on in the service of a domestic United States corporation. *The important consideration is not whether the corporate employer is domestic or alien as to juridical status.*

Foreign Service Despatch from Department of State to U.S. High Commissioner for Germany, No. A-852, Jan. 21, 1954, p. 1 (*see* Jt. App. 160a) (emphasis supplied).

The Department of State regulations adopting this practice have continued in force virtually unchanged. The current version provides that, in order to be eligible for treaty trader status, an alien must be employed in the United States by

> an individual employer having the nationality of the treaty country who is maintaining the status of a non-immigrant treaty trader, *or by an organization which is principally owned by a person or persons having the nationality of the treaty country* and, if not residing abroad, maintaining non-immigrant treaty trader status.

22 C.F.R. § 41.40(a) (1980) (emphasis supplied). The term "principally owned" has been further defined by internal Department of State guidelines as more than 50 percent owned by nationals of the treaty country. 9 FOREIGN AFFAIRS MANUAL, *Part II, "Visas."* It is a basic canon of treaty interpretation that the meaning of a treaty may be ascertained by the actual practice of the parties to that treaty. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §147 (1965). The unbroken practice of the United States under the Treaty has been to accord the full protection of the Treaty (including Article VIII) to U.S. incorporated subsidiaries of Japanese corporations.

The Immigration and Nationality Act, its implementing regulations, and these Treaty articles form a coherent whole, as reflected in the uniform practice of the United States under the Treaty. If a company meets the test set out in the Immigration and Nationality Act and the implementing regulations, then it is

afforded the protections and privileges set out in Articles I, VII, and VIII. Because Sumitomo is a company of Japan for purposes of the Act, it is of necessity a company of Japan for purposes of the Treaty, and is therefore entitled to claim the rights and privileges provided therein.

C. Article XXII(3) of the Treaty Does Not Limit Substantive Treaty Rights

Article XXII(3) of the Treaty does not preclude U.S. incorporated subsidiaries of Japanese corporations from claiming substantive treaty rights. This interpretation has been confirmed by the circuit courts which have considered the question. *Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981); *Spiess* v. *C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981).

The Article is composed of two sentences, only one of which is a definition to be applied throughout the Treaty:

> As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit.

The second sentence does not purport to be a definition of general applicability, but rather a statement imposing a conditional obligation of recognition upon the host country with regard to foreign companies:

> Companies constituted under the applicable laws and regulations within the territories of either party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

This sentence simply obligates the host country to recognize the juridical status of entities duly constituted under the laws of the other country, without the imposition of additional legal requirements.[12] Since different countries had different legal

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[12] An example of such additional legal requirements if seen in the 1923

forms which business enterprises could take, it was necessary to provide a simple test by which such enterprises could be juridically recognized when operating abroad. There was obviously no need to include domestically incorporated subsidiaries of foreign parents within the scope of these recognition provisions; such companies would have already gained juridical recognition by virtue of their incorporation in the host country.

The negotiating history of Article XXII(3) firmly establishes that its design was simply to guarantee legal recognition to diverse forms of legal entities without additional requirements. When the Japanese negotiators requested an explanation of the meaning of Article XXII(3), Jules Bassin, Legal Attaché to the United States Embassy in Tokyo, explained that the purpose of the United States in proposing this article was to clarify what is meant by a "company," which is used but not defined throughout the substantive articles of the Treaty. Bassin further explained that the Article XXII(3) definition of juridical status was intended by the United States to mean merely recognition of

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Treaty with Germany, containing a forerunner of Article XXII(3) which provided in part:

> Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State, or Provincial, of either High Contracting Party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided they pursue no aims within its territories contrary to its laws.

Treaty of Friendship, Commerce and Consular Rights with Germany of 1923, 44 Stat. 2132, art. XII. Thus juridical recognition was conditioned upon the company's maintaining a "central office" within the territories of its origin, as well as adhering to local law concerning corporate purpose. Obviously, these somewhat vague legal requirements operated to hamper foreign investment because of the uncertainty they created. The post-war FCN treaties were evidently designed to remove these legal ambiguities. *See* Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 379-81 (1956).

existence as a juridical person and nothing more. Memorandum of Conversation of Jules Bassin, Dispatch No. 13, April 8, 1952, prepared by the Office of the United States Political Advisor, Tokyo, Japan (*see* Jt. App. 136a).

A similar understanding of Article XXII(3) has been expressed by Herman Walker, an advisor to the Department of State on FCN treaties:

> The adoption of the simple test has been undoubtedly facilitated by the clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus the acknowledgment of a fact — the existence and legitimate paternity of an association — is not confused with problems associated with the functional rights and activities of alien-bred associations. . . .

Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 383 (1956). This clear distinction between the civil and functional capacities of companies was also recognized and reconfirmed in 1976 by Secretary of State Kissinger. After a thorough analysis of the history and purpose of Article XXII(3), Kissinger concluded that:

> While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. . . In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrued to them because the treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.

Telegram of Secretary of State Henry Kissinger to United States Embassy in Tokyo, No. A-105, Jan. 9, 1976 (*see* Jt. App. 157a).

An immediate predecessor of Article XXII(3) is found in Article XX(3) of the 1949 FCN Treaty with Uruguay.[13] During the negotiations Secretary of State Acheson made it evident that the second sentence of this article was intended solely to provide a simple test for recognition of a company as a legal entity, and to prevent the host country from imposing additional legal preconditions for juridical recognition. *See* Telegram from American Embassy, Montevideo, to the Secretary of State, No. 351, July 22, 1949, p. 3 (*see* Appendix No. 1, *infra*); Telegram from Secretary of State Acheson to American Embassy, Montevideo, No. 937, Aug. 3, 1949 (*see* Appendix No. 2, *infra*); Telegram from Secretary of State Acheson to American Embassy, Montevideo, No. 6289, Oct. 25, 1949, p. 2 (*see* Appendix No. 3, *infra*). From the very inception of its use in FCN treaties, therefore, this article was not intended to create, limit, or deny any other substantive rights of companies provided elsewhere in the Treaty.[14]

D. Rights Under The Japanese Treaty Were Not Intended To Be Contingent Upon The Organizational Form Of The Foreign Investment

In a Department of State position letter of October 17, 1978, Deputy Legal Advisor Lee Marks stated:

> In determining the scope of Article VIII, we see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company, nor do we see any policy reason for

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[13] S. EXEC. D., 81st Cong. 2d Sess. (1949).

[14] In reaching this same conclusion in *Avigliano*, Judge Mansfield took note of an exchange concerning this provision during the negotiation of the Dutch FCN Treaty in 1955. The thrust of this exchange was that controlled companies are entitled to the same rights as parent companies, notwithstanding a "superficial appearance to the contrary" in Article XXIII(3) (the equivalent of Art. XXII(3) in the Japanese Treaty). *See Avigliano* v. *Sumitomo Shoji America, Inc.*, 638 F.2d at 556-57.

making the applicability of Article VIII dependent on a choice of organizational form.

Letter from Lee Marks, Deputy Legal Advisor, Department of State, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, Oct. 17, 1978, at 3 (*see* Jt. App. 94a). This position letter is another manifestation of the consistent practice of the Department of State implementing these Treaty provisions.

The argument that companies of Japan may claim Article VIII rights when operating in the United States through the medium of a branch, but forfeit those rights if they operate through the medium of a subsidiary, has been rejected by both the Second and Fifth Circuits. As these courts recognized, the effect of such an interpretation would be to create a haphazard, "crazy-quilt" pattern of company rights throughout the Treaty. American branches of Japanese companies would be able to claim all rights bestowed on "companies of either Party," while U.S. incorporated subsidiaries of Japanese companies would be relegated to minor protection. There is nothing in the legislative history of the Treaty to suggest that such major Treaty rights should be dependent on the choice of corporate form. On the contrary, the parties were intent upon removing all artificial barriers to trade and commerce between the two countries.

The dissent in *Spiess* suggested that the final sentence of Article VII(1)[15] creates a special category of treatment for American subsidiaries of Japanese companies. The dissent claimed that this category of treatment, "national subsidiary treatment,"[16] confers a narrower right to controlled enterprises

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[15] Moreover, enterprises which [nationals and companies of either Party] control, whether in the form of individual proprietorships, companies, or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises by nationals and companies of such other Party.

[16] The term "national subsidiary treatment" is found nowhere in the

than that granted in the first sentence of Article VII to "nationals and companies of either Party . . . whether directly or by agent or through the medium of any form of lawful juridical entity." It was argued that this specific grant of a narrower right to Japanese-controlled American corporations "makes sense only if such a corporation is a company of the United States." 643 F.2d at 366.

This analysis assumes without question that the term "controlled enterprise" is equivalent to "subsidiary company." That this is not true was confirmed by Secretary of State Acheson during the negotiations. In a discussion of the relation between Article XXI(1)(e), concerning the treatment of "companies," and proposed Article VI(5), concerning "enterprises in which nationals and companies of either Party have a substantial interest," Secretary Acheson explained:

> *The word "enterprises" is not a synonym for "companies"; it is a much broader term, having to do with a business undertaking or establishment in the large and popular sense, regardless of juridical form, nationality, etc.*
>
> The rule of paragraph 1(e), Article XXI, has bearing on the second sentence of Article VI(5) only to the extent that the word "companies" is used therein. If an American-chartered company had a substantial interest in an enterprise in Japan, the Japanese Government would be obligated to give the treatment specified if such company were in fact American controlled, but not if such a company were controlled by nationals of third countries. The question of who controls the company is quite distinct from the question of who has what interest in the "enterprise" itself.

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negotiating documents, legislative history, authoritative commentary, or subsequent practice under the Treaty. Nor is it clear why the Treaty drafters would make such a drastic distinction between rights accorded a parent and its subsidiary, or how the rights of an American parent company differ from those of its subsidiary, if at all.

Airgram from Secretary of State Acheson to American Embassy, Tokyo, No. A-49, July 23, 1952 (*see* Jt. App. 145a) (emphasis supplied).

Thus, the purpose of the final sentence of Article VII is to provide a minimum standard of treatment for all enterprises. Far from restricting rights already conveyed by the first sentence to companies operating "directly or by agent or through the medium of any form of lawful juridical entity," this sentence extends those rights to enterprises not conducted in the form of a juridically recognized entity (*e.g.*, a sole proprietorship). Thus construed, the final sentence of Article VII(1) is a necessary complement to the rights conferred by the first sentence and does not contradict or restrict the broad rights conferred in the first sentence upon companies operating in any juridically recognized form. A similar analysis can be applied to other sections of the Treaty which deal with controlled enterprises.[17]

The term "controlled enterprise" is applicable not only to subsidiaries, but also to branches, partnerships, joint ventures, sole proprietorships, and any other form of business activity, whether or not juridically recognized. If a controlled enterprise could claim only those rights specifically granted to controlled enterprises by the Treaty, then treaty rights granted to "companies of either Party" would be meaningless. A company of either Party can operate in the territories of the other Party *only through the medium of a controlled enterprise*. Certainly it was not the parties' intent that the dozens of treaty provisions granting rights to companies of either Party actually convey no rights at all, and

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[17] More than 90% of all foreign direct investment in the United States is in companies in which foreign nationals hold majority or 100% ownership. U. S. DEP'T OF COMMERCE, REPORT TO THE CONGRESS, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES, Vol. 1, pp. 17-22; Vol. 5, pp. 6.8-6.36 (1976). By the end of 1980, Japanese direct investment in the United states totalled $4.2 billion. ECONOMIC WORLD, Dec. 1981, at 10.

the few provisions dealing with controlled enterprises actually convey all the treaty rights a company could claim.

E. Sumitomo Is a Company of Japan for Purposes of Article VIII(1) of the Treaty as Well as Other Laws and Regulations Pertaining to Foreign Investment

The question of the ascription of nationality to corporate entities has long been unsettled. Following World War I, for example, a committee of the League of Nations was formed to study the question of corporate nationality, and their survey indicated a wide divergence of practice among various countries. *See* REPORT BY THE LEAGUE CODIFICATION COMMITTEE ON RECOGNITION OF LEGAL PERSONALITY OF FOREIGN COMMERCIAL CORPORATIONS AND NATIONALITY OF COMMERCIAL CORPORATIONS, *reprinted in 22* AM. J. INT'L L. SPEC. SUPP. 157-214 (1928). The League of Nations made no further progress on this issue. Nor has the question been resolved since that time.[18]

U. S. domestic law has also lacked a single test for determining corporate nationality.[19] In fact, the great variety in definitions has made it possible for corporations to possess "dual

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[18] Immediately after the Second World War, one commentator noted that, as to a recognized test of nationality, "in the corporate field, we find confusion and uncertainty." Timberg, *Corporate Fictions*, 46 COL. L. REV. 533, 572 (1946). Nor was the question of corporate nationality settled during the time the post-war series of FCN treaties (including the 1953 Japanese Treaty) was signed. Kronstein, *The Nationality of International Enterprises*, 52 COL. L. REV. 983, 990 (1952) ("clear-cut rules cannot yet be given"); Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 382 (1956) ("the question of what should constitute a proper test [of corporate nationality] has been much debated"); 5 J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 144 (1977).

[19] *See* Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints On Foreign Enterprise*, 74 HARV. L. REV. 1489 (1961). The author evaluates six different tests of corporate nationality which have been used at various times: (1) the state of incorporation; (2) principal place of business; (3) nationality of stockholders;

nationality."[20] Despite this lack of uniformity, domestic laws of the United States consistently "pierce the corporate veil" to determine the ownership or control of a corporation for purposes of regulating alien enterprise. *see, e.g.*, Trading with the Enemy Act, 50 U.S.C. App. § 2 (1976), as interpreted in *Uebersee Finanz-Korporation, A.G.* v. *McGrath*, 343 U.S. 205 (1952); Shipping Act of 1916, §§ 52(b)(a), (c)(a), as amended, 46 U.S.C. § 802 (b)(a), (c)(a) (1976); *United States* v. *The Meacham*, 107 F. Supp. 997 (E.D. Va. 1952). In addition to these laws, there are numerous statutes and regulations specifically pertaining to foreign investment which disregard place of incorporation in determining the foreign character of an enterprise. [21]

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(4) nationality of overall investment; (5) nationality of management; and (6) control. *Id.* at 1524-50. The author notes a trend away from the state-of-incorporation test since 1900, as Congress found it was "intolerably naive" and "inappropriate" in dealing with the increasingly sophisticated corporate structures of this century. *Id.* at 1527.

[20] *Id.* at 1518 n. 139.

[21] International Investment Survey Act of 1976, 22 U.S.C. § 3101 *et seq.* (1976); 15 C.F.R. § 806, *et seq.* (1980); Agricultural Foreign Investment Disclosure Act of 1978, 7 U.S.C. § 3501 *et seq.* (Supp. II 1978); 7 C.F.R. § 781.2(g) and (i) (1980); Domestic and Foreign Investment Improved Disclosure Act of 1977, 15 U.S.C. § 78(m) (Supp. II 1978); Federal Communications Act 47 U.S.C. §§ 222(d), 310(a), 734(d)(1976); Foreign Agents Registration Act, 22 U.S.C. § 611 (1976); Atomic Energy Act, 42 U.S.C. §§ 2133, 2134 (1976); Mineral Leasing Act of 1920, 30 U.S.C. §§ 22, 24, 71, 181, 185, 352 (1976); 42 C.F.R. § 3102.1-1 (1980); Federal Aviation Act, 49 U.S.C. §§ 1301(1) and (13), 1367(f) (1976); *see generally* U.S. DEP'T OF TREASURY, SUMMARY OF FEDERAL LAWS BEARING ON FOREIGN INVESTMENT IN THE UNITED STATES, *reprinted in* S. Singer, *Regulation of Foreign Investments in the United States* 19-43 (1976).

State alien land laws also look beyond place of incorporation to the nationality of the owners and/or controllers of the business enterprise. *See, e.g.*, IOWA CODE ANN. § 567.1 (1975); MINN. STAT. ANN. § 500.221 (2) (1978 Supp.); NEB. REV. STAT. § 76-406, 76-407 (1943); N. M. CONST. art. 2, § 22; S. C. CODE ANN. § 72-13-30 (1979); WIS. STAT. ANN. § 710.02 (1979).

II. A WHOLLY OWNED U.S. SUBSIDIARY OF A JAPANESE CORPORATION IS ENTITLED TO CLAIM SUBSTANTIVE TREATY RIGHTS IN BEHALF OF ITS PARENT

In addition to whatever Treaty rights a wholly owned U.S. incorporated subsidiary of a Japanese parent may claim in its own behalf, such a company has standing to assert the Treaty rights undeniably possessed by its parent.

Under Article VII(1), a Japanese corporation has the right to manage and control its U.S. business enterprise, regardless of the form that enterprise takes. The Article VIII(1) staffing privilege is merely an elaboration of this right of control and management. Japanese trading companies routinely exercise this Treaty right in staffing their U.S. subsidiaries, which are an integral part of a global trading network.

Ordinarily, the issue of standing arises in the context of a *plaintiff* seeking to bring a cause of action to redress a claimed injury. *See Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). The issue occasionally emerges when (as here) a litigant asserts rights defensively as a bar to judgment against it. In such cases, the constitutional considerations of Article III standing do not apply, since a case or controversy is obviously present. *Warth* v. *Seldin*, 422 U.S. 490, 500 n. 12 (1975).

Standing to assert the rights of third parties has been recognized when enforcement of the challenged restrictions against the litigant would result indirectly in the violation of the third parties' rights or would "preclude or otherwise adversely affect a relationship existing between them and the persons whose rights assertedly are violated." *Warth* v. *Seldin*, 422 U.S. at 510; *Doe* v. *Bolton*, 410 U.S. 179 (1973); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969); *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965); *Barrows* v. *Jackson*, 346

U.S. 249 (1953); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

The abridging of Treaty staffing rights by the application of the employment laws here in question would adversely affect the parent company's ability to control and manage its U.S. subsidiary. Unless Sumitomo is permitted to invoke the protection of Article VIII(1) either in its own behalf or that of its parent, these valuable Treaty rights will be lost to the parent company. In these circumstances, Sumitomo clearly has standing to assert the Article VIII(1) staffing rights of its parent company. *See Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674, 693 (9th Cir.), *cert. denied* 429 U.S. 940 (1976), recognizing that a U.S. incorporated subsidiary of a foreign corporation has standing to assert treaty rights of its parent which may be affected by court ordered relief in an antitrust case.[22]

III. ARTICLE VIII(1) CONFERS THE ABSOLUTE RIGHT TO STAFF WHOLLY OWNED U.S. SUBSIDIARIES OF JAPANESE CORPORATIONS WITH MANAGERIAL PERSONNEL OF THEIR CHOICE.

At the heart of this controversy lies the proper interpretation of the freedom of choice language in Article VIII(1) of the Treaty. That provision reads in pertinent part:

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agent and other specialists *of their choice.*

(emphasis supplied). The unqualified phrase "of their choice" is unambiguous. It grants to U.S. companies in Japan and Japanese companies in the United States the vital right to select

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[22] The *Calnetics* decision implicitly overruled an earlier district court case which had denied standing to an American subsidiary of a Japanese corporation to assert Article XVIII of the Treaty as a defense to a criminal antitrust prosecution. *United States* v. *Oldham*, 152 F.Supp. 818 (N.D. Cal. 1957).

their own management and technical personnel without interference from the host country. This is the plain meaning of those words. *Spiess, supra,* 643 F.2d at 359. [23]

The post-war FCN treaties are organized along three basic standards of treatment: national treatment, most-favored-nation treatment, and absolute rules. *See* Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 805, 810-11 (1958). Though the "contingent" standards of national treatment and most-favored-nation treatment were widely used throughout these treaties, absolute rules also played a crucial role. As the Fifth Circuit noted:

> Absolute rules were intended to protect vital rights and privileges of foreign nationals in any situation, whether or not a host government provided the same rights to the indigenous population . . . According to Walker, foreign nationals were to receive "not only equal protection, but also a certain minimum degree of protection, as under international law, regardless of a Government's possible lapses with respect to its own citizens." *United States Practice, supra,* at 232.

643 F.2d at 360. Examples of such absolute rules in the Japanese Treaty include Article I (rights of entry, liberty of conscience, religious freedom, and other personal rights), Article VI(3) (right of just compensation for expropriated property), and Article XX(a) (freedom of transit.) [24]

The language of Article VIII(1) is undeniably couched in terms of an absolute rule, not merely national treatment. As Dr. Walker has noted, Article VIII(1) technically goes beyond

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[23] It should be noted that the dissent did not take issue with the panel majority's opinion on this issue.

[24] The inadequacy of the national treatment standard with respect to full compensation in case of nationalization was specifically noted by Deputy Assistant Secretary of State Linder. 1952 *Legislative Hearings* at 8 (1952).

national treatment, to prevent the imposition of ultra-nationalistic policies with regard to essential executive and technical personnel. Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373, 386 (1956). Certainly, had the drafters of the Treaty intended to tie these rights to the national treatment standard, they would have expressed that intention as they did in at least a dozen other parts of the Treaty.[25]

This interpretation of Article VIII(1) is consistent with the design of its drafters. The Senate Executive Report accompanying the Japanese Treaty and its companion treaties described Article VIII(1) as follows:

> Article VIII(1). Paragraph 1 of this Article states that companies doing business in the territory of the other party may hire "accountants and other technical experts," attorneys, agents, etc. of their choice and that *laws regarding the nationality of employees are not to prevent such nationals and companies from carrying on their activities in connection with the planning and operation of the specific enterprises with which they are connected.*

S. EXEC. REP. NO. 5, 82d Cong., 1st Sess. at 3-4 (1953) (emphasis supplied); *see also* remarks of Senator Hickenlooper, Chairman of the Subcommittee on Foreign Relations, 1952 *Legislative Hearings*, at 38.

The legislative history of the Treaty explicitly recognizes that Article VIII means precisely what it says: United States companies may use the personnel of their choice in Japan and Japanese companies enjoy a reciprocal right in the United States. Only through express recognition of this reciprocal right could United States nationals and companies obtain a meaningful guarantee of the rights under Article VII to "organize companies under the general company laws of such other Party, and . . . to control

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[25] *See, e.g.*, Articles III, IV, VI(4), VII(1), VIII(3), IX, X, XII(1), XIV(5), XVI, XIX(3), and XIX(4).

and manage enterprises which they have established or acquired."

The absolute nature of this Article VIII(1) right is well illustrated by comparing the language used in other treaties having similar provisions. In 1960, seven years after the Japanese Treaty entered into force, the United States Senate advised and consented to the Treaty of Friendship and Commerce between the United States and Pakistan. [1959] 12 U.S.T. 110, T.I.A.S. No. 4683. Article VIII of that Treaty provides:

> Nationals and companies of either Party shall be permitted, *in accordance with the applicable laws*, to engage, within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice . . .

Id. (emphasis supplied).

This limiting language in the Pakistani Treaty subjects employment of United States nationals in Pakistan and the employment of Pakistani nationals in the United States to laws governing employment that exist or may be enacted by the United States or Pakistan. The Japanese Treaty contains no such limitation. *Compare with* Treaty of Amity and Economic Relations Between the United States and Ethiopia, art. VIII(5), [1951] 4 U.S.T. 2134, T.I.A.S. No. 2864; Treaty of Friendship, Commerce & Navigation Between the United States and Italy, art. I, 63 Stat. 2255 (1949).

The absence of such limiting language in the Japanese Treaty conclusively demonstrates that the United States created an unqualified privilege to Japanese companies to operate and control their corporate entities through Japanese nationals "of their choice." *See Santovincenzo* v. *Egan*, 284 U.S. 30, 36-39 (1931).

There can be little doubt that Article VIII was intended to eliminate the possibility of host country interference in the selection of managerial level personnel. As Dr. Walker has explained:

> [M]anagement is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from percentile restrictions and the like.

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 9 AM. J. COMP. L. 229, 234 (1956). "Percentile restrictions" refer to laws requiring foreign employers to maintain a certain proportion of local nationals in its workforce.[26] These and similar laws regarding nationality were viewed as a significant infringement on a company's right to select its own personnel and protect its investment abroad.

If Article VIII(1) were construed to provide merely a "national treatment" standard, it would be superfluous. Article VII already grants companies of either Party national treatment with respect to engaging in all types of business activities within the territories of the other Party. Article VIII(1) serves no purpose if it merely conveys rights already conveyed by Article VII.

That Article VIII(1) was not considered a superfluity by the Treaty drafters is well illustrated by the negotiations on the German FCN Treaty. When the Germans proposed the deletion of Article VIII(1) on grounds that it was "unnecessary and self-evident," the American negotiators strongly and successfully resisted this proposal:

> [T]he paragraph embodies a sound and desirable principle that ought to be asserted in the treaty. The provision is

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[26] As an example, Nicaragua had such percentile restrictions in effect at the time the United States negotiated their FCN Treaty. *See* S. EXEC. DOC. G., 84th Cong., 2d Sess. at 3 (1956). The final treaty text compromised on this issue by restricting the "of their choice" provision to employees "essential to the conduct of their affairs." Treaty of Friendship, Commerce & Navigation between the United States and Nicaragua, art. VIII, para. 1, [1956] 9 U.S.T. 449, T.I.A.S. No. 4024. At the time of the Japanese Treaty, several American states had similar laws restricting the employment opportunities of aliens. *See* 1953 *Legislative Hearings* at 28.

> attributed some importance by American interests; and its omission from the treaty would be calculated to arouse apprehension concerning Germany's intentions, as well as set a bad precedent for negotiations with countries where its presence would be most helpful in curbing extreme tendencies to discriminate against, for example, American accounting firms there established for the purpose of servicing American investments.

Diplomatic Note from the U.S. High Commissioner for Germany to the German Federal Ministry of Foreign Affairs, Dec. 15, 1953, p. 2 (*see* Jt. App. 254a).

Obviously, a "national treatment" standard with regard to staffing rights would be inadequate to avoid the detrimental impact of these nationality restrictions. Even if such a law nominally applied to all employers, domestic or foreign, only foreign companies would be forced to operate under a disadvantage, since only they would be expected to employ a substantial number of aliens in managerial positions. Local companies would naturally tend to employ local citizens and have no need (unlike foreign enterprises) to engage foreign managerial and technical personnel. Thus, a percentile law applying equally to domestic and foreign companies may have an extremely detrimental impact only upon the foreign enterprise. Only an absolute rule such as that contained in Article VIII(1) is sufficient to accomplish the parties' intent to overcome such restrictive employment laws, whatever their nature.[27]

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[27] Even if this Treaty privilege were viewed as preferential treatment of foreign nationals, Congress has on many occasions authorized such special treatment. *Mathews* v. *Diaz*, 426 U.S. 67, 78 n. 12 (1976). *See, e.g.*, 19 U.S.C. § 1586(e) (1976) (liability for unlawful unlading or transshipment); 50 U.S.C. App. § 453 (1976) (draft registration); Diplomatic Relations Act § 5, 22 U.S.C.A. § 254d (1979)(diplomatic agents, administrative and technical staff, and their families); International Organizations Immunities Act, § 7, 22 U.S.C. § 288d (1976) (foreign representatives to, and officers and employees of international organizations); Agreement Between the United Nations and the United States of America regarding the Headquarters of the United Nations, § 15, 61 Stat. 756 (1947).

The evident purpose of Article VIII(1) was to avoid domestic employment restrictions such as percentile laws. Civil rights laws regarding employment, although perhaps enacted for different purposes, affect employee selection practices in essentially the same way as percentile laws. A mere numerical imbalance in racial and ethnic representation in the employer's work force may sometimes be sufficient to establish a prima facie violation of Title VII. *See Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977). In practice, civil rights laws are the functional equivalent of percentile laws, differing only in that they are stated in the form of negative prohibitions rather than positive mandates.

Neither Title VII nor Section 1981 has abrogated the staffing rights created by Article VIII(1). The Treaty is self-executing and became part of the domestic law of the United States without the necessity of further legislative action. *See, e.g., Bacardi Corp. of America, Inc.* v. *Domenech*, 311 U.S. 150, 161 (1940). A subsequent statute will abrogate an earlier one only where such an intention has been clearly expressed. *Cook* v. *United States*, 288 U.S. 102, 120 (1933). As the Fifth Circuit has observed, "No evidence suggests that Congress intended to repudiate Article VIII(1) when it enacted Title VII." 643 F.2d at 362. Removing this limited exemption from Title VII and Section 1981 would reduce the Article VIII staffing privilege to a nullity.

The Economic Recovery Tax Act of 1981[28] gives clear evidence of the high priority which Congress continues to place on the reciprocal right of U.S. companies to utilize American employees in their foreign operations. This act allows qualifying Americans working for U.S. companies abroad to elect a substantial exclusion from U.S. tax for their foreign earned income. Thus, more than 28 years after the ratification of the Japanese

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[28] Pub. L. No. 97-34, 95 Stat. 172.

Treaty, Congress continues to recognize the importance of Treaty staffing rights to U.S. companies operating abroad, and has created special tax incentives to enable U.S. companies to make greater use of these rights.

The right conferred by Article VIII is an essential component of American trade and economic policy toward Japan. This policy removes the artificial barriers inhibiting trade and commerce with Japan by American investors, and with the United States by Japanese investors. This Court has recognized exceptions to Title VII where justified by long-standing policy considerations of high importance. *See Morton* v. *Mancari*, 417 U.S. 535 (1974). This is another such case. This Court should "decline to abrogate the American government's solemn undertaking with respect to a foreign nation." *Spiess, supra*, 643 F.2d at 362.

CONCLUSION

For these reasons, it is submitted that the Court of Appeals for the Second Circuit's decision limiting the scope of Sumitomo's rights under Article VIII(1) of the Japanese Treaty is erroneous. This Court should adopt the views of the Court of Appeals for the Fifth Circuit as expressed in *Spiess*.

Respectfully submitted,

By Neil Martin .....

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CERTIFICATE OF SERVICE

I, Neil Martin, one of the attorneys for C. Itoh & Company (America), Inc., do hereby certify that on this the 18th day of January, 1982, three (3) copies of the foregoing Brief were placed in the United States mail, postage prepaid, to each of the following counsel of record:

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APPENDIX
No. 1

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

CONFIDENTIAL

No. 351 American Embassy, Montevideo, Uruguay.
July 22, 1949.

Subject: Progress in Negotiations of Treaty of Friendship, Commerce, and Economic Development between the United States and Uruguay.

The Honorable
The Secretary of State,
Washington.

Sir:

I have the honor to refer to the Embassy's confidential telegram no. 209 of June 16 and the Department's confidential telegram no. 152 of June 29 concerning the negotiation of a Treaty of Friendship, Commerce and Navigation between the United States and Uruguay, and specifically concerning points raised by the Uruguayan Bank of the Republic. Reference is also made to this Embassy's confidential telegram no. 266 of July 21 on the same subject.

Sr. Ariosto GONZALEZ, the Uruguayan negotiator, returned to Montevideo this week and negotiations were resumed on Wednesday, July 20. González showed the Embassy's representative the formal comment of the Bank of the Republic on the latest Spanish draft of the Treaty, (a copy of which comment is enclosed) and expressed concern over the Bank's note, especially over the contents of paragraph four, page one. He then suggested the possibility of a confidential exchange of notes at the time or signing of the Treaty (rather than a

modification of the Additional Protocol, as the Bank had suggested), which would establish the fact that during the course of the negotiations the rig t of Uruguay was recognized to apply restrictions, by currencies, on imports, exports and capital transfers so long as Uruguay had favorable balances of inconvertible currencies and so long as there was no return to multilateral trade.

The Embassy's representative then proposed that the changes in Article XVI (2) and (4) and the omission of Article XIX (1) (E), as contained in the Department's telegram no. 152, be considered prior to considering the possibility of any further exchange of notes or revision of the Additional Protocol. González approved the suggested revisions but expressed some doubt as to whether they would be sufficient to satisfy the Bank. He agreed, however, to present the revised articles to the Bank, although he requested that the Department consider the possibility of an exchange of confidential names as mentioned above, in the eventuality that the Bank might continue to object to the financial provisions of the Treaty.

González emphasised that for political reasons and in order to afford reasonable assurances of the approval of the Treaty by the Uruguayan Congress, the approval of the Treaty by the Bank was vital. Anticipating possible continued objections of the Bank, he suggested one other possibility, in case the Department should not approve the idea of an exchange of confidential notes. This was to the effect that at the time of the signing the Treaty, the Uruguayan Government might present a note to the

Embassy requesting that the right of Uruguay to apply discriminatory measures on the basis of currencies in the issuance of import licenses and in permitting capital transfers so long as she held favorable balances of inconvertible currencies and so long as there was no return to multilateral trade, be clarified. He suggested that the Embassy might reply, stating that such a clarification was not necessary since the terms of the Treaty established this point, in accordance with the rights and obligations reserved to Uruguay under the Articles of Agreement of the International Monetary Fund.

González proposes to present to the Bank without delay the revisions of Article XVI proposed by the Department, and the suggested omission of Article XIX (1) (E). These will be presented under cover of an note in which González proposes to point out: (1) that the provisions of the Treaty, including the proposed revisions of Articles XVI and XIX, do not imply any immediate obligation on the part of Uruguay to change existing regulations and controls on exports, imports and capital transfers; (2) that the Additional Protocol clearly establishes Uruguay's right to apply quantitative restrictions on imports and exports in keeping with the provisions of Article XIV (2) of the International Monetary Fund Agreement.

The Embassy's representative, in discussing with González objections noted in the Bank's note of June 20, expressed some surprise that the Bank would raise objections to terms of the Treaty based on regulations set up in the International Monetary Fund Agreement (see paragraph four, page two of enclosed

note from Bank), since the Uruguayan Government had subscribed to the Agreement. González agreed and stated that he would call attention to this point in his covering note to the Bank. He also stated that he would talk personally to the Uruguayan President; to Sr. SILVEIRA Zorzi, the General Manager of the Bank; and to Sr. Rotkohi, the Manager of the Foreign Trade Department of the Bank, in an effort to obtain the approval of the Bank without delay.

Further progress in the negotiations of the Treaty is largely dependent upon the Bank's examination of the proposed revisions of Article XVI and XIX and its reaction to the proposals.

With reference to Embassy Despatch no. 222 of May 12 and the Department's confidential telegram no. 132 of June 2, the following points have been agreed upon. The Department's revision of Article II was adopted by González. In Article VI (1) (a), "the practice of law" has been eliminated, as reflected in the latest Spanish text of the Treaty, sent to the Department under cover of Despatch no. 225 of May 16. In Article XII (2), the changes noted in the Department's telegram no. 132 have been accepted. In Article XIIX (2) the final sentence has been deleted and this deletion is reflected in the latest Spanish text, now in possession of the Department.

In regard to Article XX (3) (Spanish text), González proposed to replace the period at the end of the paragraph by a comma and continue

> "debiendo sujetarse a las prescripciones establenidas por las leyes de la Parte en cuyos territorios intenten realizar el

> ejercicio habitual de actos comprendidos en el objeto de an institucion."

The English text of Article XX (3) might be extended by replacing the period at the end of the paragraph by a comma, and continuing

> "but shall be obliged to comply with regulations established by the laws of the Party in whose territories they propose to carry on regularly the activities for which they are organized."

González pointed out that companies of the United States as defined in Article XX (3) of the Treaty will, upon the signing of the Treaty, enjoy privileges accorded other foreign companies by the Treaty of International Commercial Law signed by Uruguay, Argentina, Bolivia, Brazil, Chile, Paraguay and Perú on February 13, 1889, and the Treaty of International Law of Terrestrial Commerce signed by Uruguay, Brazil, Colombia, Bolivia, Argentina and Chile on March 19, 1940. Provisions of these treaties establish, in González's opinion, the right of companies organized and with recognized juridical status in signatory countries, or in other countries enjoying the privileges accorded in the treaties, to have their juridical status recognized in other signatory countries, to enjoy civil rights in such other signatory countries, and to appeal to or defend themselves before the courts of such countries. Such companies may even carry on isolated commercial operations, provided such operations do not constitute "the regular exercise of the operations for which the company was organized". In other words, such companies are

obliged to comply with the Uruguayan legal regulations governing organization of companies, activities, etc. only when they plan actively to conduct business, commerce, or other normal transactions in Uruguay in a regular and continued manner.

González called attention to the fact that his suggested addition to Article XX (3) follows as nearly as possible the wording of Title II, Article 8 of the Treaty of March 19, 1940.

Pages 407-416, inclusive, and pages 661-672, inclusive, of the "Colección de Tratados, Convenciones, y Acuerdos Económico-Comerciales", vol. I, published by the Ministry of Foreign Relations are enclosed. These pages contain the full text of the two commercial treaties referred to above.

Title II, Articles 4, 5, 6, and 7 of the Treaty of February 13, 1889 and Title II, Articles 6, 7, 8, 9, 10 and 11 of the Treaty of March 19, 1940, which González noted are applicable to the points covered in Article XX (3) of the proposed Treaty between Uruguay and the United States, follow.

"TITULO II
De las sociedades

Artículo 4°. El contrato social se rige, tanto en su forma como respecto a las relaciones jurídices entre los socios, y entre la sociedad y los terceros, por la ley del país en que ésta tiene su domicilio comercial.

Art. 5°. Las sociedades o asociaciones que tengan carácter de persona jurídica se regirán por las leyes del país de su domicilio; serán reconocidas de pleno derecho como

tales en los Estacos, y hábiles para ejercitar en ellos derenchos civiles y gestionar su reconocimiento ante los Tribunales.

Mas para el ejarcicio de actos comprendom dos en el objectô de su institución, su dujetan . . a las prescripciones establecioas en el estano en el cual intenten realizerlos.

Art. 6°. Las sucursales o agencias constituídas en un Estado por una sociedad radicada en otro, se considerarán comiciliadas en el lugar en que funcionan y sujetas a la jurisdicción de las autoridades locales, en lo concerniante a las operaciones que practiquen.

Art. 7°. Los Jueces del país en que la sociedad tiene su domicilio legal, son competentes para conocer de los litigios que surjan enbre los socios o que inicien los terceros contra la sociedad.

Sin embargo, si una sociedad domiciliada en un Estado realiza operaciones en otro, que den mérito a controversias judiciales, podrá ser demandada ante los Tribunales del último.

TITULO II

De las sociedades

Artículo 6°. La ley del domicilio comerciel rige la calidad del documento que requiere el contrato de sociedad.

Los requisitos de forma del contrato se rigen por la ley del lugar de su celebración.

Las formas de publicidad queden sujetas a lo que determine cada Estado.

Art. 7°. El contenido del contrato social; las relaciones jurídicas entre los social; entre estos y la sociedad; y entre le

misma y terceros, se rigen por la lay del Estado en donde la sociedad tiene domicilio comercial.

Art. 8°. Las sociedades mercantiles se regirán por las leyes del Estado de su domicilio comercial; serán reconocidas de pleno derecio en los otros Estados contratantes y se reputarán hábiles para ejercer actos de comercio y comparcer en juicio.

Mas, para el ejercicio habitual de los actos comprendidos en el objeto de su institución, se ejecutarán a las prescripciones establecidas por las leyes del Estado en el cual intenten realizarlos.

Los representantes de dichas sociedades contraen para con terceros las mismas responsabilidades que los administradores de las sociedades locales.

Art. 9°. Las sociedades o corporaciones constituidas en un Estadeo bajo una especie desconocide por las leyes de otro, pueden ejercer en este último actos de comercio, ragatendose a las prescripciones locales.

Art. 10°. Las condiciones legales de emisión o de negociación de acciones o titulos de obligaciones de las sociedades comerciales, se rigen por la ley del Estado en donde esas emisiones o negociaciones se lleven a efecto.

Art. 11°. Los jueces del Estado en donde la sociedad tiene su domicilio, son competentes para conocer de los litigios que surjan entre los socios en su carácter de tales, o que inicien los terceros contra la sociedad.

Sin embargo, si una sociedad domiciliada en un Estado realiza en otro operaciones que den mérito a controversias judiciales, podrá ser demandada ante los jueces o tribunales del segundo."

It is the embassy's opinion that Article XX (3) with the addition proposed by Gonzáles guaranteed to companies organized and with recognized juridical status in the United States, those rights and privileges sought by the inclusion of this section in the Treaty; viz., the right to appeal to, to be heard by, and to defend themselves before the courts and administrative tribunels and agencies of Uruguay; to enjoy recognized civil rights in general; and to be required to comply with legal regulations only when they carry on their regular business or other activities in Uruguay.

If this amendment to Article XX (3) is acceptable to the Department, it is believed that the only serious obstacle remaining to the acceptance of the Treaty in its present form is the opinion of the Bank of the Republic concerning restrictions on financial transactions as now covered by the Treaty.

Respectfully yours,
For the Ambassador:

L. O. Sanderhoff
Second Secretary

Enclosures:

1. Comment from Bank of the Republic on Treaty, dated June 20, 1949.

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2. Tratado de Derecho Comercial Internacional, Febrero 13, 1889.
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WLitsey:hd

APPENDIX
No. 2

OUTGOING TELEGRAM

Department of State

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CLASSIFICATION

AMEMBASSY

MONTEVIDEO

URUG interpretation ART XX(3) Treaty appears very close to that of DEPT (EMBDES 351, JULY 22), but proposed additional language seems unnecessarily broad and might be susceptible of construction that would restrict rights set forth elsewhere in Treaty.

VERBATIM TEXT: EMB requested propose that in place of additional clause FOL sentence be added: QTE It is understood that recognition of juridical status does not of itself confer rights upon a company to engage in the activities for which it was organized UNQTE

ACHESON

ITP:CP:VGSetser:met

8-2-49 OFD L/E L/T RPA

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OUTGOING TELEGRAM

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CLASSIFICATION

Since paragraph provides only for recognition of juridical rights, the understanding should be related only to that recognition and not to the general meaning or extent of rights of juridical persons. If Urug insists, however, language quoted Urdes 515 acceptable.

Changes Protocol (6) and add para Protocol satisfactory, also proposed changes Spanish translation.

ACHESON

ITP:CP:VGSetser:lgm

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APPENDIX
No. 3

OUTGOING TELEGRAM

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AMEMBASSY,

MONTEVIDEO.

FCN Treaty. Art IX(2). Substance of change unobjectionable but phrase QUOTE Each Party UNQUOTE is ambiguous. Propose QUOTE made in accordance with the applicable laws, which shall at least assure UNQUOTE. If this is unacceptable, propose QUOTE made in accordance with the laws of the Party within whose territories the property is located UNQUOTE. Quoted Spanish not in accord previous agreed translation. Emb pls check. Emb requested make strong effort add following sentence: QUOTE Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof UNQUOTE. (Dept A-231 at 17) Final clause recognizes advanced character Urug law. Urdes 515 Oct 14.

Art XIII(2). Change unobjectionable.

Art XX(3). Change acceptable as to second sentence. Final sentence should read QUOTE It is understood that the recognition of such rights does not of itself confer rights upon a company to engage regularly in the business activities for which it was organized. UNQUOTE Since paragraph provides only for recognition of juridical rights, the understanding should be related only to that recognition and not to the general meaning

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OUTGOING TELEGRAM

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or extent of rights of juridical persons. If Urug insists, however, language quoted Urdes 515 acceptable.

Changes Protocol (6) and add para Protocol satisfactory, also proposed changes Spanish translation.

ACHESON

ITP:CP:VGSetser:lgm

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Nos. 80-2070 and 81-24

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner & Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents & Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF THE EAST ASIATIC COMPANY, LTD., THE EAST ASIATIC COMPANY, INC., AND HEIDELBERG EASTERN, INC. IN SUPPORT OF PETITIONER SUMITOMO SHOJI AMERICA, INC.

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Of Counsel

QUESTION PRESENTED

In the complete absence of an expression of Congressional intent, has Title VII of the Civil Rights Act of 1964, as amended, impliedly revoked the express right of Japanese corporations set forth in Article VIII(1) of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan to fill management-level positions in their United States branches and subsidiaries with Japanese citizens?

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IN THE

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OCTOBER TERM, 1981

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SUMITOMO SHOJI AMERICA, INC.,

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—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CHRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

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STATEMENT OF INTEREST

Amici curiae herein are three corporations, one, The East Asiatic Company, Ltd., incorporated in the Kingdom of Denmark and the other two, Heidelberg Eastern, Inc. and The East Asiatic Company, Inc., incorporated pursuant to the laws of the State of New York. The East Asiatic Company, Ltd. is the

parent corporation of The East Asiatic Company, Inc., which in turn controls Heidelberg Eastern, Inc. Like Petitioner, The East Asiatic Company, Ltd. has claimed the right to select Danish citizens "of its choice" to serve as managerial personnel in its United States branches and subsidiaries pursuant to a Treaty of Friendship, Commerce and Navigation between the United States and Denmark (the "Danish Treaty"). The complete text of the Danish Treaty is attached hereto as Appendix A.

The *amici curiae* herein have an interest in this litigation due to the great similarity between the Danish Treaty and the Treaty of Friendship, Commerce and Navigation between the United States and Japan (the "Japanese Treaty" or the "Treaty") at issue in the instant litigation. The Danish Treaty, Article VII(4) provides in pertinent part that (emphasis added):

> *Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party,* accountants and other technical experts, *executive personnel*, attorneys, agents and other specialized employees *of their choice, regardless of nationality.*

12 U.S.T. at 915.

Similarly, the Japanese Treaty, Article VIII(1) provides in pertinent part that (emphasis added):

> *Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party,* accountants and other technical experts, *executive personnel*, attorneys, agents and other specialists *of their choice.*

4 U.S.T. at 2070.

Accordingly, any judicial or legislative action which affects the interpretation of the rights of Japanese corporations under the Japanese Treaty also will clearly affect the interests of Danish corporations under the Danish Treaty.

Moreover, Danish corporations are not the only foreign governments, nationals, and corporations with a substantial

interest in the Court's interpretation of the Japanese Treaty herein. The Danish Treaty is one of many Treaties of Friendship, Commerce and Navigation entered into between United States and other countries,[1] and these FCN Treaties, most of which contain a similar provision for staffing executive-level positions with citizens of the foreign country, affect a substantial amount of the foreign trade which the United States conducts worldwide. One report of the massive volume of this international trade states that the direct investment abroad of United States corporations totaled in excess of $192 billion in 1979, and that foreign direct investment in the United States in the same year exceeded $52 billion. Petitioner's Pet. for Cert. at 9 n. 7. Consequently, the rights of a substantial number of both United States and foreign corporations, which rights help these corporations generate the billions of dollars in international trade involving the United States, will either be significantly protected or dismantled by this Court's decision herein.

Like Petitioner, the *amici curiae* herein are defendants in an action brought by a former employee, a United States citizen, who alleges that the failure of his U.S. employer, Heidelberg Eastern, Inc., to promote him and his subsequent termination from employment violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et seq.* ("Title VII") and were not protected by Article VII(4) of the Danish Treaty. *See Linskey v. Heidelberg Eastern, Inc.*, 470 F. Supp. 1181 (E.D.N.Y. 1979). On a motion for reconsideration made subsequent to the decision of the Second Circuit herein below and of

---

1 The United States is a party to approximately thirty such Treaties of Friendship, Commerce and Navigation ("FCN Treaties") with various nations, including Italy, Ireland, Colombia, Greece, Israel, Denmark, Japan, Federal Republic of Germany, Haiti, Nicaragua, Uruguay and others. *See* Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int'l L. 373, 373 n. 1 (1956); Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 230 n. 3 (1956); Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 Stan. L. Rev. 947, 948 n. 6 (1979) (and accompanying text).

the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 343 (5th Cir. 1981), the District Court in *Linskey* refused to reverse its position even though it found the rationale in *Spiess* "quite compelling". Petitioner's Suppl. Brief in Supp. of Pet. for Cert., App. C at 22a.

Moreover, like Petitioner, the *amici curiae* herein have similarly defended their hiring and promotion practices in the *Linskey* action by claiming protection from such claims under Title VII by virtue of valid and enforceable rights granted to them by the Danish Treaty, which allows the *amici curiae* herein, as well as all Danish corporations, the unfettered right to appoint Danish citizens "of their choice" to management positions in their U.S. branches and subsidiaries.

Because of the significance of the Treaty rights at stake herein and in the several lawsuits involving similar treaties, a decision by this Court adverse to Petitioner will have a substantial detrimental impact on the international trade carried on between the United States and many other countries throughout the world. However, as demonstrated below, a decision herein adverse to Petitioner is completely unnecessary since the Treaty neither conflicts with Title VII nor has been revoked or superseded by it.

In order to protect the great volume of international trade involving the United States, and because any decision by this Court herein will substantially resolve the issues raised by the litigation in which the *amici curiae* herein are involved, the *amici curiae* herein respectfully submit this Brief urging this Court to uphold the rights granted Petitioner by the Japanese Treaty against Respondents' challenge below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated January 9, 1981 is reported at 638 F.2d 552. The opinion of the United States District Court for the Southern District of New York dated June 5, 1979 is reported at 473 F. Supp. 506. Certification for immediate appeal pursuant to 28 U.S.C. § 1292(b) was granted in an opinion of the United States District Court for the Southern District of New York dated August 9, 1979, unofficially reported at 20 Empl. Prac. Dec. (CCH) ¶ 30,205 and 20 Fair Empl. Prac. (BNA) 72. The opinion of the United States District Court for the Southern District of New York on reargument, dated November 29, 1979, is unofficially reported at 21 Empl. Prac. Dec. (CCH) ¶ 30,501 and 21 Fair Empl. Prac. (BNA) 580.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 9, 1981. On November 3, 1981, this Court granted Petitioner's Request for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. 50 U.S.L.W. 3334 (1981). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

This brief *amici curiae* is submitted pursuant to Rule 42 of the Rules of the United States Supreme Court, by the consent of all parties to this action which is on file with this Court.

TREATY, STATUTES, AND REGULATION INVOLVED

1. Article VIII(1) of the Treaty provides in relevant part (4 U.S.T. 2063, 2070):

> Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice.

2. Article VII(1) of the Treaty provides (4 U.S.T. at 2069):

> Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired.

3. Section 703(a) of Title VII (42 U.S.C. § 2000e-(2)(a)) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment. because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

4. Section 703(e) of Title VII (42 U.S.C. at § 2000e-2(e)) provides in relevant part:

> (e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice

> for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

5. Section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101(a)(15)(E), provides in relevant part:

> [A]n alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national . . . (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national . . . .

6. 22 C.F.R. § 41.40(a)(1981) provides in relevant part:

> (a) An alien shall be classifiable as a non-immigrant treaty trader if he establishes to the satisfaction of the consular officer that he qualifies under the provisions of section 101(a)(15)(E)(i) of the Act and that: (1) He intends to depart from the United States upon the termination of his status; and (2) if he is employed by a foreign person or organization having the nationality of the treaty country which is engaged in substantial trade as contemplated by section 101(a)(15)(E)(i), he will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity.

STATEMENT OF THE CASE

Petitioner Sumitomo Shoji America, Inc. ("Sumitomo" or "Petitioner"), defendant in the District Court below, is established under the laws of the State of New York, is a wholly-owned subsidiary of a Japanese commercial enterprise, and, as such, is "controlled" by such Japanese commercial enterprise as contemplated in Article VII(1)(c) of the Treaty.

Respondents, plaintiffs in the District Court below, claim with one exception to be citizens of the United States and past or present female secretarial employees of Sumitomo, and claim, *inter alia,* that Sumitomo's practice of hiring male, Japanese citizens for management-level positions discriminates against them on the basis of U.S. nationality in violation of Section 7(a) of Title VII. Petitioner's Pet. for Cert., App. A at 3a.

SUMMARY OF ARGUMENT

The FCN Treaties, including the Japanese Treaty, create rights on behalf of foreign corporations to exercise control over their United States branches and subsidiaries and to appoint and employ foreign citizens "of their choice" as managers in those United States branches and subsidiaries. Since these FCN Treaties, including the Japanese Treaty, create rights on behalf of foreign corporations to use their own *citizens* as managerial personnel, these FCN Treaties do not come into conflict with the provisions of Title VII or the judicial decisions promulgated thereunder, which statutory provisions and judicial decisions do not prohibit discrimination on the basis of citizenship. Moreover, the right of both foreign and Japanese corporations to use entirely their own citizens, if they so choose, as managerial personnel could not have been modified or abrogated by Title VII, since there is absolutely no Congressional intent, express or implied, or statutory mandate, to do so.

These conclusions are in every respect as true for the Japanese Treaty as they are for FCN Treaties as a whole. The language of Article VIII(1) of the Japanese Treaty expressly grants Japanese corporations a right to appoint to the executive positions in their United States branches and subsidiaries Japanese citizens of their choice, which right neither conflicts with nor has been expressly or impliedly amended or revoked by Title VII.

ARGUMENT AND AUTHORITIES

THE 1953 TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES AND JAPAN CREATES A TREATY RIGHT TO STAFF MANAGERIAL PERSONNEL OF AMERICAN SUBSIDIARIES OF JAPANESE CORPORATIONS WITH JAPANESE CITIZENS OF THEIR CHOICE, WHICH RIGHT HAS NOT BEEN ABROGATED OR AMENDED.

A. Article VIII(1) of the Treaty Confers a Right on Japanese Corporations to Employ Japanese Citizens of their Choice as Managerial Personnel in the United States.

The 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan entered into force on October 30, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863, as a self-executing Treaty which became part of the domestic law of the United States without the necessity of further legislative action. *See, e.g., Asakura v. Seattle,* 265 U.S. 332, 341 (1924); *Bacardi Corp., Inc. v. Domenech,* 311 U.S. 150, 161 (1940).[2]

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2 That Petitioner and similarly situated United States subsidiaries of foreign corporations have standing to invoke the rights of the Treaty has already been favorably determined in the Second Circuit decision below, 638 F.2d at 555-558, and in *Spiess v. C. Itoh & Company (America), Inc.,* 643 F.2d, 353, 356-359, *reh. granted,* 654 F.2d 302 (5th Cir. 1981). We rely on the arguments set forth in those decisions in concluding that Petitioner's standing to invoke the rights granted by the Treaty cannot seriously be disputed.

The language of the Japanese Treaty expressly grants Japanese corporations the right to fill management-level positions in their United States branches and subsidiaries with Japanese nationals of their choice. Article VIII(1) of the Treaty provides in relevant part that:

> *Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party,* accountants and other technical experts, *executive personnel,* attorneys, agents and other specialists *of their choice.*

4 U.S.T. at 2070 (emphasis added).

In addition to the express language in the Treaty itself, the Department of State has unambiguously interpreted Article VIII(1) of the Treaty to confer on Japanese companies and their branches and subsidiaries the right to use Japanese citizens as managerial personnel in the United States. This Court should give meaning to the Treaty consistent with these genuine shared expectations of the contracting parties. *See Maximov v. United States,* 299 F.2d 565, 568 (2d Cir. 1962), *aff'd,* 373 U.S. 49 (1963); *Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 35 (2d Cir. 1975); *Compagnie Financiere de Suez et de L'Union Parisienne v. United States,* 492 F.2d 798, 810-811 (Ct. Cl. 1974).

One source of the State Department's interpretation of the Treaty is its interpretation of FCN Treaties given to Congress at the time several FCN Treaties were being negotiated. During hearings held on July 13, 1953 before the Senate Subcommittee on Commercial Treaties, Committee on Foreign Relations, reported as *Commercial Treaties,* Hearing before the Subcommittee of the Committee on Foreign Relations, U.S. Senate, 83d Cong., 1st Sess. (the "1953 Hearings"), the State Department presented a tabular comparison of several proposed FCN Treaties and compared, *inter alia,* the Japanese Treaty to the 1949 Treaty of Friendship, Commerce and Navigation between the United States and Uruguay. That tabular comparison contains the following entries:

APPROVED TREATIES	PROPOSED TREATIES
URUGUAY	JAPAN
Art. V(4): Right to engage technical and managerial personnel *regardless of nationality.* Such employees may perform limited duties in other country without necessarily having qualified to practice a profession therein.	Art. VIII(1): *Same.*

1953 Hearings, *supra* at 6-9 (emphasis added).

Another source of the State Department's interpretation of the Treaty is found in a letter dated October 17, 1978 to Abner W. Sibal, General Counsel of the Equal Employment Opportunity Commission, by the State Department Deputy Legal Advisor, Lee R. Marks, who stated that:

> Article VIII(1) of the [Japanese] FCN Treaty gives nationals and companies of each Party the right to employ, in the territory of the other, "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." This provision was intended to ensure that U.S. companies operating in Japan could have U.S. personnel for critical positions, and vice versa. *The phrase "of their choice" should be interpreted to give effect to this intention, and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders.*

Letter of Lee R. Marks, State Department Deputy Legal Advisor, to Abner W. Sibal, General Counsel, Equal Employment Opportunity Commission, dated October 17, 1978, *re-*

printed in 73 Am. J. Int'l L. 281 (1979) (Joint Appendix at 94a) (emphasis added).[3]

Thus, the above tabular comparison between the Uruguay Treaty and the then-proposed Japanese Treaty, as well as the Marks letter, demonstrates that both the original State Department interpretation and the United States Senate's understanding of the Treaty at the time of the Treaty's self-execution unambiguously embrace a right of Japanese corporations to fill management-level positions in their United States branches and subsidiaries with Japanese citizens of their choice.

Therefore, the express language of Article VIII(1) of the Treaty, the legislative understanding of the Treaty, and the original State Department interpretation of the Treaty all recognize that Japanese nationals and companies have a right under the Treaty to use Japanese citizens "of their choice" as managerial personnel in their United States branches and subsidiaries.

The right of a foreign corporation to control completely the operation of its United States branches and subsidiaries has been recognized in contexts other than that of the Japanese

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3 Two additional letters have been issued by individuals within the State Department subsequent to the letter by Deputy Legal Advisor Marks quoted herein; both subsequent letters purported to interpret the rights granted by FCN Treaties. However, the Second Circuit below refused to heed either letter, 638 F.2d at 558 n.5, and this Court should do the same. With respect to the first letter dated September 11, 1979, *reprinted in* 74 Am. J. Int'l L. at 158-59 (1980), from James R. Atwood, Deputy Legal Advisor, U.S. Department of State, to Lutz Alexander Prager, Esq., Assistant General Counsel, Equal Employment Opportunity Commission, the Second Circuit noted that the Atwood letter, although it disagreed with the Marks letter, did not carry any weight with the court since it never explained how the Marks letter was in error. *Id.* With respect to the second letter dated September 9, 1980 from the U.S. Department of State to the Government of Denmark, the Second Circuit dismissed that letter after it found evidence that the EEOC, which was *amicus* on the appeal in support of the plaintiffs below, had participated in the preparation of the letter. *Id.*

Treaty. For example, in a statement by Tyge Lehmann, Head of Division, Legal Department, Ministry of Foreign Affairs, Kingdom of Denmark (Appendix B hereto), the Danish Government has unambiguously declared that:

> Danish companies which control and manage enterprises established or acquired in the United States according to Article VIII(1) [of the Danish Treaty] are entitled to engage Danish nationals in positions such as specified in Article VII(4). American companies, of course, enjoy the equivalent right in Denmark. *This interpretation is not only expressly underlined by the use in Article VII(4) of the words ". . . employees of their choice, regardless of nationality . . .", but is likewise mandated if the right [provided in the Danish Treaty] to control and manage enterprises in the territories of the other Party is to be maintained.*

App. B at 1 (emphasis added). This statement is similar to a previous statement by the Danish Ministry in a letter dated October 17, 1979 to The East Asiatic Company, Ltd., Joint Appendix at 309a. In the October 17, 1979 letter, the Danish Ministry commented that:

> Art. VII, paragraph 4, under which national companies of either Party are permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialized employees of their choice, regardless of nationality, *has the direct aim of ensuring these companies the right to engage own [sic] citizens, i.e. foreigners in the eyes of the other Party, to fill the said posts.*

Joint Appendix at 309a. These statements demonstrate that the right of a foreign corporation to exercise control over the selection of the executive personnel in its U.S. operations is recognized by Denmark as well as many other governments who are parties to FCN Treaties.

A conclusion that Article VIII(1) of the Japanese Treaty guarantees Japanese nationals and corporations the ability to control completely the citizenship of managerial personnel in their United States branches and subsidiaries furthers the express policy of the Treaty to promote international trade. As the Assistant Secretary of State for Economic Affairs, Samuel C. Waugh, testified before the Senate:

> The object of the Department of State in negotiating treaties of this type is to facilitate the protection of American citizens and their interests abroad.
>
> * * *
>
> Such treaties facilitate the protection of American interests because they contain definite commitments with regard to specific rights.

1953 Hearings, *supra* at 2. Further:

> Of special concern to investors [under the FCN Treaties] are such assurances as . . . the right of the owner to manage his own affairs and employ personnel of his choice. . . .

1953 Hearings, *supra* at 2.

It must be kept in mind that the policy of promoting international trade, in part through the use of the executive selection rights granted in Article VIII(1) of the Japanese Treaty by our own country's nationals and companies operating through branches or subsidiaries in Japan, was not ignored by the Department of State in negotiating the Treaty. As Assistant Secretary of State Waugh further testified before the Senate:

> The extension of reciprocal privileges to aliens in this country has not, as an object in itself entered into the planning or execution of the program of negotiating in these treaties, *but it is necessary in order to secure*

> *American rights abroad.* Mutuality is the only basis upon which it is possible to obtain the assurances required.

1953 Hearings, *supra* at 3 (emphasis added).

Further, a Senate Executive Report of hearings regarding FCN Treaties, entitled "General Nature of Commercial Treaties", states:

> It must be borne in mind in considering these conventions that they are based on the principal of mutuality in that when the United States gives a right or privilege to an alien to carry on activities in the United States, or assumes an obligation with respect to protecting the rights of aliens, the United States *in turn obtains similar rights and privileges for American citizens in the foreign country with which the Treaty is concluded. Conventions of this type are advantageous to the United States since so many Americans conduct business in foreign countries.*

S. Exec. Rep. No. 5, 82d Cong., 1st Sess., at 3 (1953) (emphasis added).

Since the Treaty grants Japanese corporations freedom to select Japanese citizens of their choice for executive positions in their United States branches and subsidiaries, any analysis of this case or of a Japanese corporation's rights under the Treaty in general pursuant to the *bona fide* occupational qualification ("bfoq") exception of Title VII, 42 U.S.C. § 2000e-2(e), is unwarranted. Although the Second Circuit below noted that the bfoq exception might appropriately be applied herein, 638 F.2d at 559, any decision that a Japanese corporation must justify its executive selection decisions under the bfoq exception to Title VII, whether such exception is narrowly or expansively drawn, effectively ignores the meaning and dismantles the effect of Article VIII(1) of the Treaty. Such a decision would strip a party protected by the Treaty of its rights under the Treaty and would place it in the same position as if the Treaty and Article VIII(1) thereto had never been

enacted. Consequently, to the extent that Petitioner's Treaty rights are enforced herein, any bfoq analysis is unnecessary.

In summary, the Treaty was negotiated by the United States and Japan more than a quarter of a century ago to provide a right to Japanese corporations to fill executive positions in their United States branches and subsidiaries with Japanese citizens of their choice, with reciprocal rights granted to U.S. nationals and corporations. The Treaty was developed for the purpose of facilitating international trade among the parties and was predicated on the right of nationals to establish and thoroughly control corporate enterprises in the host country through management personnel of their choice. Many other FCN Treaties have also been enacted, and the rights granted foreign corporations by all of these FCN Treaties have assisted in the development of a substantial volume of international trade involving the United States. Since the Japanese Treaty and other FCN Treaties provide the foundation for a significant portion of the foreign economic policy of the United States toward Japan and of Japan toward the United States, the rights granted by the Japanese Treaty should be given full effect. *See Bacardi Corp. v. Domenech,* 311 U.S. 150 (1940); *Factor v. Laubenheimer,* 290 U.S. 276 (1933); *Reed v. Wiser,* 555 F.2d 1079 (2d Cir.), *cert. denied,* 434 U.S. 922 (1977).

B. Since Article VIII(1) of the Treaty Provides Japanese Corporations the Right to Appoint Only Japanese Citizens of their Choice to Managerial Positions in their United States Branches and Subsidiaries, the Treaty Does Not Conflict with the Provisions of Title VII of the Civil Rights Act of 1964, As Amended.

It is clear from the Legislative Hearings conducted concurrent to the enactment of the Treaty and from the legislation implementing the Treaty and enabling the rights established therein to become available to the Parties, that Article VIII(1) of the Treaty grants, *inter alia,* a Japanese corporation only the right to use Japanese *citizens* "of its choice" in executive positions for its United States branches and subsidiaries. First,

Section 101(a)(15)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(E)(i)—which effectuates the Treaty rights of nationals and companies of Japan to appoint executive personnel "of their choice" to positions in their enterprises in the United States—provides "Treaty Trader" status to Japanese *citizens* seeking to enter the United States for the purpose of carrying on international trade from within the United States. Hence, this legislation effectuating the Treaty circumscribes the scope of the rights granted by Article VIII(1) of the Treaty by granting a right to enter the United States under the Treaty solely on the basis of the entering employee's Japanese citizenship.

Second, in 1952, at Hearings before the Subcommittee on Commercial Treaties and Consular Conventions, Senate Committee on Foreign Relations, 82d Cong., 2d Sess. 6 (1952) (the "1952 Hearings"), the term "nationality", which is the operative term in Article VIII(1) of the Treaty, and the term "citizen" were used synonymously. *See, e.g.*, Letter from Jack Tate, Acting Legal Advisor of the Department of State, to Senator Sparkman, 1952 Hearings, *supra* at 40; *see also,* Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers,* 31 Stan. L. Rev. 947, 952 (1979).

Accordingly, Article VIII(1) of the Treaty grants Japanese companies the right to select Japanese *citizens* "of their choice" for managerial positions in their United States subsidiaries and branches. Since the rights granted by Article VIII(1) of the Treaty to Japanese companies only involve the *unrestricted* selection of Japanese citizens to fit limited positions, such Treaty rights do not conflict with the express provisions of Title VII of the Civil Rights Act of 1964 or the judicial decisions promulgated thereunder.

The express language of Title VII does not prohibit employment decisions purely on the basis of alienage or citizenship. Section 7(a) of Title VII provides, in pertinent part, only that:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any

> individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin. . . .*

42 U.S.C. § 2000e-2(a)(1) (emphasis added). Thus, the operative language of Title VII herein does not expressly prohibit the selection of Japanese citizens, solely on the basis of their citizenship, by a Japanese corporation for managerial positions in such Japanese corporation's United States branches or subsidiaries.

Additionally, the conclusion that the clear statutory language of Title VII does not prohibit citizenship-conscious employment decisions, is supported by prior decisions of this Court. In this Court's decision in *Espinoza v. Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973), an employer's refusal to hire a person because of her foreign citizenship was held by this Court not to violate the provisions of Title VII of the Civil Rights Act. Instead, this Court held that, by the term "national origin", Congress had not intended to refer to distinctions based upon citizenship. *Id.* at 89-91. *See also, Ramirez v. Sloss*, 615 F.2d 163, 167 n. 5 (5th Cir. 1980) ("The 1964 Act [Title VII] does not apply to employment discrimination on the basis of alienage."); *cf. Nguyen v. Montgomery Ward & Co., Inc.*, 513 F. Supp. 1039 (N.D.Tex. 1981).

Finally, the primary policy considerations underlying Title VII are not implicated by the citizenship-conscious employment selection in this case. It must be kept in mind that Title VII is much more compellingly applied to cases of discrimination against insular and discrete minorities than in situations, as here, where a majority of United States citizens is attempting to invoke Title VII to prohibit the employment of members of a discrete minority of Japanese citizens. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 449 (1980); *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress . . . to

eliminate those discriminatory practices and devices which have fostered . . . stratified job environments to the disadvantage of *minority* citizens") (emphasis added). Since Article VIII(1) of the Treaty furthers the legitimate policy of promoting international trade—without discriminating against any "minority" group—a decision herein upholding Article VIII(1) of the Treaty does not undermine Title VII's special solicitude for protecting discrete and insular minorities.

Accordingly, since Petitioner's right under Article VIII(1) of the Treaty to employ Japanese nationals in its United States operations is based solely upon such employees' Japanese citizenship, and since Title VII does not prohibit employment discrimination on the basis of citizenship, the selection of Japanese citizens to fill executive-level positions of United States branches and subsidiaries of Japanese corporations neither violates Title VII of the Civil Rights Act, nor even implicates the policy of Title VII to protect insular minorities against unjust discrimination. Therefore, the rights granted by Article VIII(1) of the Treaty should be upheld.

C. The Rights Conferred by Article VIII(1) of the Treaty to Manage and Control Branches and Subsidiaries of Japanese Corporations Have Not Been Amended or Revoked by Title VII of The Civil Rights Act, As Amended.

A holding herein that Title VII has neither amended nor rescinded rights established by Article VIII(1) of the Treaty is consistent with the language of and practice surrounding the Treaty, with the legislative history of Title VII, and with this Court's long-standing practice of enforcing to the greatest extent possible international treaties vis-a-vis subsequent domestic legislation.

1. The Rights Granted by Article VIII(1) of the Treaty Were Intended to Have Effect Regardless of Other Conflicting Domestic Legislation.

For several reasons, a Japanese corporation's right pursuant to the Treaty to fill executive-level positions in its United States

branches and subsidiaries with Japanese citizens of its choice is not circumscribed by federal or state laws which might otherwise affect the employment practices of a U.S. domestic corporation.

First, the language of the Treaty itself supports this conclusion. Article VIII(1) provides that the Japanese companies may select management-level personnel "of their choice". These words would be rendered virtually meaningless if they were interpreted to be impliedly qualified by a phrase such as "except as elsewhere provided."

Second, and more importantly, one State Department negotiator of the Treaty and of similar Treaties of Friendship, Commerce and Navigation has recognized expressly that the right granted by the Treaty to Japanese corporations to fill the management-level positions in their United States branches and subsidiaries with Japanese citizens is effective regardless of existing U.S. laws which otherwise regulate employment practices. Herman Walker, Jr., a member of the Department of State who negotiated the Treaty and many other FCN Treaties between the United States and other nations, has, in several articles without official attribution, commented in relation to this managerial-level employee selection right:

> Though equal provision for subordinate investor-enterprise employees is not yet possible owing to lack of statutory authority, such personnel is to an extent provided for, in that *management is assured freedom of choice* in the engaging of essential executive and technical employees in general, regardless of their nationality, *without legal interference* from "percentile" restrictions and the like. . . .

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice,* 5 Am. J. Comp. L. 229, 234 (1956) (emphasis added). Further, noting that the rights granted by certain FCN Treaty provisions were not "contingent" on whether domestic laws were favorable, Mr. Walker noted:

> There is also a certain margin for the play of non-contingent standards, or "absolute" rules, in the formulation of [these] treaty provisions.

Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 Minn. L. Rev. 805, 811 (1958).

Hence, although a substantial portion of the Treaty grants Japanese corporations only those rights also available to domestic United States corporations ("national treatment"), *see, e.g.,* Walker, *Provisions on Companies in United States Commercial Treaties,* 50 Am. J. Int'l L. 373, 384 (1956), the affirmative grant to Japanese corporations of a right to use Japanese citizens as managerial and technical personnel in their United States branches and subsidiaries goes "beyond national treatment. . . ." Walker, *Provisions on Companies in United States Commercial Treaties, supra* at 386.

Third, the other provisions in Article VIII of the Treaty demonstrate that Article VIII of the Treaty unconditionally provides Japanese corporations the right of "free choice" in selecting Japanese citizens to serve as managerial-level personnel in their United States branches and subsidiaries. In addition to the language of Article VIII(1) quoted above that Japanese companies may "engage . . . executive personnel . . . of their choice," Article VIII(1) also permits certain Japanese professionals to engage in certain types of employment within the United States regardless of their compliance with United States statutes and regulations which regulate the employment of United States citizens who are professionals in the same occupations. Article VIII(1) of the Treaty further provides, in pertinent part that (emphasis added):

> Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts *regardless of the extent to which they have qualified for the practice of a profession within the territories of such other Party,* for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and compa-

> nies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

See also, Walker, *Provisions on Companies in United States Commercial Treaties, supra* at 386. This other Article VIII(1) right of a Japanese corporation to employ certain professionals in its United States operations regardless of U.S. laws regulating the qualifications of those professionals, demonstrates that all Article VIII(1) rights, including the right at issue here of selecting executive personnel, have been negotiated to be exempt from, and in fact are not subject to, the restrictions of laws which otherwise affect United States citizens and corporations.

In summary, the language of, the practice surrounding, and the clear import of the remaining portions of Article VIII(1) demonstrate that the rights granted by the Treaty to Japanese corporations to staff their United States branches and subsidiaries with Japanese executives is not contingent in any way upon the existence of other domestic United States legislation.

The above conclusion that the "of their choice" provision of Article VIII(1) the Treaty creates a limited but absolute rule that permits foreign nationals and corporations to control their overseas investments through the selection of a few executive-level personnel has already been expressly set forth by the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981). In that decision, the Court stated:

> [c]onsidering the Treaty as a whole, the only reasonable interpretation is that ["of their choice"] means exactly what it says: Companies have a right to decide which executives and technicians will manage their investment in the host country, *without regard to host country laws.*

643 F.2d at 361 (emphasis added).

And:

> [i]t is apparent that *article VIII(1)*'s "of their choice" provision *was intended*, not to guarantee national treatment, but *to create an absolute rule permitting foreign nationals to control their overseas investments.*

643 F.2d at 360 (emphasis added).

Hence, the rights granted to Japanese corporations by Article VIII(1) of the Treaty are not contingent upon other domestic United States legislation.

It must be noted that the right granted by the Treaty to Japanese companies to fill managerial-level positions with Japanese citizens of their choice, despite the existence of U.S. laws regulating employment practices, does not depend upon whether such U.S. laws would be characterized as "ultranationalistic" or "progressive". First, the clear language of Article VIII of the Treaty does not distinguish between those two "types" of statutes but, instead, grants the executive-selection right unconditionally. Second, such a characterization of legislation is difficult at best and must necessarily presume an improper intent on the part of Congress if the statute is viewed other than as "progressive" or otherwise well-intended. Finally, any attempt to abrogate the Article VIII(1) Treaty rights on a selective basis as a result of necessarily loose characterizations of the conflicting domestic legislation subverts the purpose and legislative understanding of the Treaty, which is to promote international trade by allowing foreign investors complete control over their investments abroad. Accordingly, it is irrelevant whether the source of potential interference with the Treaty is viewed as "progressive" or "ultranationalistic" legislation—the Treaty rights should prevail.

2. *Title VII Has Neither Amended Nor Revoked the Rights Granted by Article VIII(1) of the Treaty.*

Although Congress was fully aware of the privilege created by Article VIII(1) of the Japanese Treaty and the other FCN Treaties at the time it enacted Title VII and its subsequent

amendments, the legislative history of Title VII and its amendments, as well as the statute itself are devoid of any intention to amend or supersede these long-standing Treaty rights.

First, Title VII should not be held to amend or revoke Article VIII(1) of the Treaty since Congress never expressed any intention to do so. This Court will not give effect to any attempt to revoke a treaty without a clear expression from Congress. As this Court has said elsewhere, "[i]f Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 285 n. 13 (1974). *Itzcovitz v. Selective Service Local Board No. 6, New York*, 301 F. Supp. 168 (S.D.N.Y. 1969), *appeal dismissed*, 422 F.2d 828 (2d Cir. 1970); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). Similarly, a fundamental principle of treaty interpretation is that:

> A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.

Cook v. United States, 288 U.S. 102, 120 (1933). As has been stated regarding the rule established in *Cook, supra*:

> This familiar rule [in *Cook*] should be strictly applied because relations with other countries are directly affected. *Courts should be more hesitant to find that statutes of Congress modify or abrogate treaty provisions* than to find that they repeal existing legislation *because Congress was not the principal draftsman or actor in making the treaty part of the "supreme law of the land."* Thus, [a] standard repealer clause . . . cannot be read to affect [a] treaty right unless the legislative history manifestly evidences such intention.

Itzcovitz, supra, at 181 (emphasis added); *see also, McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). Similarly, in *Asakura v. Seattle*, 265 U.S. 332 (1924), this Court stated:

> Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.

265 U.S. at 342. *See also, Bacardi Corp. v. Domenech,* 311 U.S. 150 (1940); *Factor v. Laubenheimer,* 290 U.S. 276 (1933); *United States v. A.L. Burbank & Co., Ltd.,* 525 F.2d 9 (2d Cir. 1975).

Title VII has not amended or revoked Article VIII(1) of the Treaty, since Congress neither debated nor even mentioned the Japanese Treaty and the other FCN Treaties in enacting Title VII. Pursuant to the long-standing principles of treaty interpretation set forth above, this utter silence is insufficient to bring about any change in the force of the Article VIII(1) Treaty rights. If Congress had intended in 1964 to modify or revoke the vast number of long-standing Treaty rights of nationals and corporations of Japan and of many other countries throughout the world to employ managerial personnel of their choice in the United States, such a fundamental departure from the rights of foreign nationals and corporations surely would have been the subject of intense debate during the legislative hearings and discussions on Title VII and its 1972 Amendments. However, neither does the language of Title VII, its amendments, or the legislative history thereof contain any reference to the many Treaty commitments of the United States, nor do they refer in any way to any intent to modify those Treaty commitments. *See generally,* U.S. Code Cong. & Admn. News, 88th Cong., 2d Sess. (1964) at 2355; U.S. Code Cong. & Admn. News, 92d Cong. 2d Sess. (1972) at 2137. Moreover, although Congress had further opportunity to modify, revoke, or even comment upon the FCN Treaty rights while it considered the 1972 Amendments to Title VII, its continued silence regarding the FCN Treaties is ample evidence of its unwillingness to abrogate in any way the rights created therein.

It cannot be imagined even for a moment that Congress in enacting Title VII would intend to revoke rights under numer-

ous FCN Treaties protecting uncounted thousands of foreign nationals and corporations, of which rights Congress was well aware, without as much as a single statement either in the legislative history of Title VII or in the statute itself. To believe that Congress would silently revoke such substantial and long-standing Treaty rights is sheer folly.

Second, the failure of Congress to revoke expressly or even mention the Treaty rights of foreign nationals and corporations is in stark contrast to the clear Congressional action taken upon the passage of the Foreign Boycotts Act, 91 Stat. 244. In that Act, Congress expressly provided that the United States Civil Rights Laws should be applied to foreign corporations, noting that:

> [n]othing in this subsection may be construed to supersede or limit the operation of the antitrust or civil rights laws of the United States.

50 U.S.C. app. § 2403-1a, Section 4A(a)(4), 91 Stat 244, 246 (1977). Thus, the Foreign Boycotts Act demonstrates that, when Congress intends to bring foreign corporations operating in the United States within the ambit of the laws of the United States, it does so in a clear, unambiguous manner.

Third, a long-continued practice under a treaty, known and acquiesced in by Congress, raises a presumption of Congressional consent to it. *Dames & Moore v. Regan*, 49 U.S.L.W. 4969, 4978 (July 2, 1981) (citing *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915)). Consequently, the failure of Congress expressly to revoke these Treaty rights demonstrates that it had no intention of superseding, modifying, or revoking, *inter alia*, the Article VIII(1) Treaty rights of Japanese corporations to use Japanese citizens as managerial personnel in their United States branches and subsidiaries.

Finally, this Court should apply to the instant action the reasoning of its decision in *Morton v. Mancari*, 417 U.S. 535 (1974), that the repeal of a Treaty by implication is not favored, in holding that the Treaty rights of Japanese corpora-

tions have not been amended or revoked by Title VII. In *Morton v. Mancari, supra,* this Court reviewed the relationship between Title VII and a previously enacted statute authorizing preferential treatment in the employment of Indians on or near Indian reservations. This Court held that the preferential employment reference in that statute, which was in contradiction to Title VII, had not in fact been repealed by the 1972 Amendments to Title VII. 417 U.S. at 545-547. In so holding, the Court noted that:

> This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference [in the Indian employment statute] is a long standing important component of the government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

417 U.S. at 550; *see also, Watt v. Alaska,* 49 U.S.L.W. 4433 (Apr. 21, 1981); *United States v. Will,* 449 U.S. 200, 221 (1980); *T.V.A. v. Hill,* 437 U.S. 153, 189 (1978). In *Morton v. Mancari, supra,* the Court also stated that, while the Indian preference statute was a specific provision applying to a specific situation:

> [t]he 1972 [Civil Rights] Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.

417 U.S. at 550-51. *See also, Rossi v. Brown,* 467 F. Supp. 960 (D.D.C. 1979), *rev'd,* 642 F.2d 553 (D.C. Cir. 1980), *cert. granted,* 50 U.S.L.W. 3244 (October 5, 1981) (District Court *held* that specific provisions of 5 U.S.C. (Supp. III) 7201 note, which allows certain specific forms of discrimination, "controls over the general provisions of Title VII"); *Radzanower v.*

Touche Ross & Co., 426 U.S. 148, 155 (1976); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957).

In summary, the Treaty creates for Petitioner Sumitomo the right to fill all of its managerial positions in the United States with Japanese citizens. This limited treaty privilege to appoint citizens of Sumitomo's choice does not conflict with either the express terms of Title VII or the judicial decisions promulgated thereunder, and the rights created by this Treaty have not been expressly amended or revoked by Title VII or other subsequent act of Congress.

Accordingly, this Court should protect the international network of rights established by the FCN Treaties by upholding the rights granted to Japanese corporations in Article VIII(1) of the Japanese Treaty to appoint Japanese citizens as executive-level personnel in their United States operations. Such a result herein in favor of Petitioner would be consistent with the language of the Treaty and Title VII, the original State Department and Congressional understanding of the Treaty, and the legislative history of Title VII, and such a result would also protect the substantial international trade network which has developed with the assistance of the FCN Treaties.

CONCLUSION

For the reasons stated above, this action should be remanded to the District Court below with instructions to dismiss the nationality discrimination action for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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APPENDIX A

Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark.

The United States of America and the Kingdom of Denmark, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements encouraging mutually beneficial investments, promoting mutually advantageous commercial intercourse and otherwise establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded, and for that purpose have appointed as their Plenipotentiaries,

The President of the United States of America:

His Ambassador Extraordinary and Plenipotentiary, Mrs. Eugenie Anderson,

and

His Majesty the King of Denmark:

His Minister for Foreign Affairs,

Mr. Ole Bjorn Kraft,

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following Articles:

Article I.

Each Party shall at all times accord equitable treatment to the persons, property, enterprises and other interests of nationals and companies of the other Party.

Article II.

1. Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and for the purpose of engaging in related commercial activities; and (b) for other purposes subject to the laws relating to the entry and sojourn of aliens.

2. Nationals of either Party, within the territories of the other Party, shall be permitted: (a) to travel therein freely, and to reside at places of their choice; (b) to enjoy liberty of conscience; (c) to hold both private and public religious services; (d) to gather and to transmit material for dissemination to the public abroad; and (e) to communicate with other persons inside and outside such territories by mail, telegraph and other means open to general public use.

3. The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and necessary to protect the public health, morals and safety.

Article III.

1. Nationals of either Party within the territories of the other Party shall be free from unlawful molestations of every kind, and shall receive the most constant protection and security, in no case less than that required by international law.

2. If, within the territories of either Party, a national of the other Party is accused of crime and taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel.

Article IV.

1. Nationals of either Party shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that establish a pecuniary compensation on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment.

2. In addition to the rights and privileges provided in paragraph 1 of the present Article, nationals of either Party shall, within the territories of the other Party, be accorded national treatment in the application of laws and regulations establishing a system of compulsory insurance in the case of the United States of America and a system of voluntary insurance in the case of the Kingdom of Denmark, under which benefits are paid without an individual test of financial need against loss of wages or earnings due to unemployment.

Article V.

1. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in either business or nonprofit activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

2. Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. No award duly rendered pursuant to

any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party.

Article VI.

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to unlawful entry or molestation. Official searches and examinations of such premises and their contents, when necessary, shall be made with careful regard for the convenience of the occupants and the conduct of business.

3. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for public purposes nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

4. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established or in the capital, skills, arts or technology which they have supplied.

5. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 3 of the present Article. Moreover, enterprises in which nationals and

companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

Article VII.

1. Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to engaging in commercial, manufacturing, processing, financial, construction, publishing, scientific, educational, religious and philanthropic activities.

2. Nationals and companies of either Party shall further be accorded, within the territories of the other Party, most-favored-nation treatment with respect to:

a) the activities listed in paragraph 1 of the present Article;

b) exploring for and exploiting mineral deposits;

c) engaging in fields of economic and cultural activity in addition to those listed in paragraph 1 of the present Article or in sub-paragraph b) of the present paragraph;

d) organizing, participating in and operating companies of such other Party.

3. With respect to professional activities, nationals of either Party shall be accorded national treatment within the territories of the other Party, except as to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute exclusively to citizens of the country.

4. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel,

attorneys, agents and other specialized employees of their choice, regardless of nationality. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

Article VIII.

1. Nationals and companies of either Party shall be accorded within the territories of the other Party the right to constitute companies for engaging in commercial, manufacturing, processing, financial, construction, mining, publishing, scientific, educational, religious and philanthropic activities, and to control and manage enterprises which they have been permitted to establish or acquire within such territories for the foregoing and other purposes.

2. Companies, controlled by nationals and companies of either Party and constituted under the applicable laws and regulations within the territories of the other Party for engaging in the activities listed in paragraph 1 of the present Article, shall be accorded national treatment therein with respect to such activities.

Article IX.

1. Nationals and companies of either Party shall be accorded national treatment within the territories of the other Party with respect to acquiring all kinds of movable property by testate or intestate succession or through judicial process and all kinds of immovable property by testate or intestate succession.

2. Nationals and companies of either Party shall be accorded national treatment within the territories of the other

Party with respect to acquiring, by purchase, lease or otherwise, and with respect to owning movable property of all kinds, both tangible and intangible, subject to the right of such other Party to limit or prohibit, in a manner that does not impair rights and privileges secured by Article VIII, paragraph 1, or by other provisions of the present Treaty, alien ownership of particular materials that are dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on particular types of activities.

3. Nationals and companies of either Party shall be accorded, with respect to acquiring immovable property within the territories of the other Party, the treatment generally accorded to foreigners under the laws of the place where the property is situated; and they shall be permitted to maintain tenure of immovable property necessary and proper to the exercise of rights and privileges secured by Article VII or by other provisions of the til [sic] present Treaty, in conformity with the applicable laws and regulations.

4. Nationals and companies of either Party may be required, within the territories of the other Party, to dispose of property they may have acquired:

a) in the case of movable property, if the alien ownership thereof is limited or prohibited pursuant to paragraph 2 of the present Article;

b) in the case of immovable property, if the property is held for purposes other than those referred to in paragraph 3 of the present Article.

Conditions or requirements shall not be imposed upon such disposition that would prevent the realization of full and just value. Particularly, a term of at least five years shall be allowed in which to effect such disposition.

5. Nationals and companies of either Party shall be accorded national treatment within the territories of the other Party with respect to disposing of property of all kinds, subject to the provisions of paragraph 4 of the present Article.

Article X.

Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment with respect to obtaining and maintaining patents of invention, and with respect to rights in trade marks, trade names, trade labels and industrial property of all kinds.

Article XI.

1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

4. In the case of companies of either Party engaged in trade or other gainful pursuit within the territories of the other

Party, and in the case of nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party but not resident therein, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

5. Notwithstanding the provisions of the present Article, each Party may: (a) accord specific advantages as to taxes, fees and charges to nationals, residents and companies of third countries on the basis of reciprocity, if such advantages are similarly extended to nationals, residents and companies of the other Party; (b) accord to nationals, residents and companies of a third country special advantages by virtue of an agreement with such country for the avoidance of double taxation or the mutual protection of revenue; and (c) accord to its own nationals and to residents of contiguous countries more favorable exemptions of a personal nature with respect to income taxes and inheritance taxes than are accorded to other nonresident persons.

Article XII.

1. Nationals and companies of either Party shall be accorded by the other Party national treatment and most-favored-nation treatment with respect to payments, remittances and tranfers of funds or financial instruments, between the territories of the two Parties as well as between the territories of such other Party and of any third country.

2. Neither Party shall impose exchange restrictions as defined in paragraph 5 of the present Article except to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people and to prevent its monetary reserves from

falling to a very low level or to effect a reasonable increase in very low monetary reserves. It is understood that the provisions of the present Article do not alter the obligations either Party may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a Party to impose such particular restrictions.

3. If either Party imposes exchange restrictions in accordance with paragraph 2 above, that Party shall make provisions at the earliest possible date and to such an extent as may be practicable for the withdrawal of: (a) the compensation referred to in Article VI, paragraph 3, of the present Treaty, (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, amounts originating from depreciation of direct investments, and capital transfers; however, transfers dealt with under (c) shall be considered in the light of special needs for other transfers. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

4. Exchange restrictions shall not be imposed by either Party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, trade, and other interests of the nationals and companies of the other Party, nor to the competitive position thereof. Each Party shall afford the other Party adequate opportunity for exchanging views at any time regarding problems that might arise from the application of the present Article.

5. The term "exchange restrictions" as used in the present Article includes all restrictions, regulations, charges, taxes or other requirements imposed by either Party which burden or interfere with payments, remittances, or transfers of funds or

of financial instruments between the territories of the two Parties.

Article XIII.

Commercial travelers representing nationals and companies of either Party engaged in business within the territories thereof shall, upon their entry into and departure from the territories of the other Party and during their sojourn therein, be accorded most-favored-nation treatment in respect of the customs and other matters, including, subject to the exceptions in Article XI, paragraph 5, taxes and charges applicable to them, their samples and the taking of orders.

Article XIV.

1. Each Party shall accord most-favored-nation treatment to products of the other Party, from whatever place and by whatever type of carrier arriving, and to articles destined for exportation to the territories of such other Party, by whatever route and by whatever type of carrier, in all matters relating to customs duties and other charges, and with respect to all other regulations, requirements and formalities imposed on or in connection with imports and exports.

2. Neither Party shall impose any prohibition or restriction on the importation of any product of the other Party, or on the exportation of any article to the territories of the other Party, that:

a) if imposed on sanitary or other customary grounds of a non-commercial nature or in the interest of preventing deceptive or unfair practices, arbitrarily discriminates in favor of the importation of the like product of, or the exportation of the like article to, any third country;

b) if imposed on other grounds, does not apply equally to the importation of the like product of, or the exportation of the like article to, any third country; or

c) if a quantitive regulation involving allotment to any third country with respect to an article in which such other Party has an important interest, fails to afford to the commerce of such other Party a share proportionate to the amount by quantity or value supplied by or to such other Party during a previous representative period, due consideration being given to any special factors affecting the trade in the article.

3. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to all matters relating to importation and exportation.

4. As used in the present Treaty the term "products of" means "articles the growth, produce or manufacture of". The provisions of the present Article shall not apply to advantages accorded by either Party:

a) to products of its national fisheries;

b) to adjacent countries in order to facilitate frontier traffic; or

c) by virtue of a customs union or free trade area of which either Party may become a member, after having informed the other Party of its plans and having afforded it opportunity to express its views thereon.

Article XV.

1. Each Party shall promptly publish laws, regulations and administrative rulings of general application pertaining to rates of duty, taxes or other charges, to the classification of articles for customs purposes, and to requirements or restrictions on imports and exports or the transfer of payments therefor, or affecting their sale, distribution or use; and shall administer such laws, regulations and rulings in a uniform, impartial and reasonable manner. As a general practice, new administrative requirements affecting imports, with the exception of requirements imposed on sanitary grounds or for reasons of public

safety, shall not go into effect before the expiration of 30 days after publication, or alternatively, shall not apply to articles en route at time of publication.

2. Each Party shall provide an appeals procedure under which nationals and companies of the other Party, and importers of products of such other Party, shall be able to obtain prompt and impartial review and correction of administrative action relating to customs matters, including the imposition of fines and penalties, confiscations, and rulings on questions of customs classification and valuation by the administrative authorities. Penalties imposed for infractions of the customs and shipping laws and regulations shall be merely nominal in cases resulting from clerical errors or when good faith can be demonstrated.

Article XVI.

1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use.

2. Articles produced by nationals and companies of either Party within the territories of the other Party, or by companies of the latter Party controlled by such nationals and companies, shall be accorded therein treatment no less favorable than that accorded to like articles of national origin by whatever person or company produced, in all matters affecting exportation, taxation, sale, distribution, storage and use.

Article XVII.

1. Each Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other Party solely in accordance with commercial considerations including price, quality, availability, marketability, transportation and other

conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to complete for participation in such purchases and sales.

2. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies, (b) the awarding of concessions and other government contracts, and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

Article XVIII.

1. The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.

2. The Parties recognize that conditions of competitive equality should be maintained in situations in which publicly owned or controlled trading or manufacturing enterprises of either Party engage in competition, within the territories thereof, with privately owned and controlled enterprises of nationals and companies of the other Party. Accordingly, such private enterprise shall, in such situations, be entitled to the benefit of any special advantages of an economic nature accorded such public enterprises, whether in the nature of subsidies, tax exemptions or otherwise. The foregoing rule shall not apply, however, to special advantages given in connec-

tion with: (a) manufacturing goods for government use, or supplying goods and services to the government for government use; or (b) supplying, at prices substantially below competitive prices, the needs of particular population groups for essential goods and services not otherwise practically obtainable by such groups.

3. No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

Article XIX.

1. Between the territories of the two Parties there shall be freedom of commerce and navigation.

2. Vessels under the flag of either Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that Party both on the high seas and within the ports, places and waters of the other Party.

3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other Party; but each Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.

4. Vessels of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to the right to carry all articles that may be carried

by vessel to or from the territories of such other Party; and such articles shall be accorded treatment no less favorable than that accorded like articles carried in vessels of such other Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.

5. Vessels of either Party that are in distress shall be permitted to take refuge in the nearest port or haven of the other Party, and shall receive friendly treatment and assistance.

6. The term "vessels", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraph 2 and paragraph 5 of the present Article, include fishing vessels or vessels of war.

Article XX.

There shall be freedom of transit through the territories of each Party by the routes most convenient for international transit:

a) for nationals of the other Party, together with their baggage;

b) for other persons, together with their baggage, en route to or from the territories of such other Party; and

c) for articles en route to or from the territories of such other Party.

Such persons and articles in transit shall be exempt from customs duties, from duties imposed by reason of transit, and from unreasonable charges and requirements; and shall be free from unnecessary delays and restrictions. They shall, however, be subject to measures referred to in Article II, paragraph 3, and to nondiscriminatory regulations necessary to prevent abuse of the transit privilege.

Article XXI.

1. The present Treaty shall not preclude the application of measures:

a) regulating the importation or exportation of gold or silver;

b) relating to fissionable materials, to radioactive by-products of the utilization or processing thereof or to materials that are the source of fissionable materials;

c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;

d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; and

e) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly a controlling interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts.

2. The most-favored-nation provisions of the present Treaty relating to the treatment of goods shall not apply to advantages accorded by the United States of America or its territories and possessions to one another, to the Republic of Cuba, to the Republic of the Philippines, to the Trust Territory of the Pacific Islands or to the Panama Canal Zone.

3. The provisions of the present Treaty shall not preclude action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade during such time as such Party is a contracting Party to the General Agreement on Tariffs and Trade. In case a Party is not a contracting Party to the General Agreement on Tariffs and

Trade it shall nevertheless have the right to depart from the provisions of the present treaty to the extent necessitated by its international balance of payments position, in a manner contemplated by said agreement as nearly as may be practicable, and subject to the principle set forth therein that such departures shall be conformable with a policy designed to promote the maximum development of nondiscriminatory foreign trade and to expedite the attainment both of a balance of payments position and of reserves of foreign exchange which will obviate the necessity of such departures. The most-favored-nation provision of the present Treaty shall not apply to special advantages accorded by virtue of the aforesaid agreement.

4. The present Treaty does not accord any rights to engage in political activities.

5. Nationals of either Party admitted into the territories of the other Party for limited purposes shall not enjoy rights to engage in gainful occupations in contravention of limitations expressly imposed, according to law, as a condition of their admittance.

Article XXII.

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

2. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or

not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

4. National treatment accorded under the provisions of the present Treaty to companies of the Kingdom of Denmark shall, in any State, Territory or possession of the United States of America, be the treatment accorded therein to companies created or organized in other States, Territories and possessions of the United States of America.

Article XXIII.

The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each of the Parties, other than Greenland, the Panama Canal Zone and the Trust Territory of the Pacific Islands.

Article XXIV.

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.

Article XXV.

The present Treaty shall replace the convention of friendship, commerce and navigation signed April 26, 1826, except Articles 8, 9, and 10 thereof, which shall remain in force until replaced by a consular convention between the two Parties or

until one year after either Party shall have given to the other Party written notice of termination of the aforesaid Articles.

Article XXVI.

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Washington as soon as possible.

2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.

3. Either Party may, by giving one year's written notice to the other Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Danish languages, both equally authentic, at Copenhagen, this first day of October, one thousand nine hundred and fifty-one.

/s/ EUGENIE ANDERSON

PROTOCOL

At the time of signing the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark the undersigned Plenipotentiaries, duly authorized by their respective governments, have further agreed on the following provisions, which shall be considered integral parts of the aforesaid Treaty:

1. The term "access" as used in Article V, paragraph 1, comprehends, among other things, access to free legal aid and right to exemption from providing security for costs and judgment.

2. The provisions of Article VI, paragraph 3, providing for the payment of compensation shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party.

3. The provisions of Article VII, paragraph 1, shall not be construed to affect the policy of Denmark of requiring that aliens may not be employed in Denmark unless the appropriate permits have been granted. However, in keeping with the terms of that paragraph, the regulations governing employment shall be applied in a liberal fashion.

4. Notwithstanding the provisions of Article VII, paragraph 1, a Party may require companies desiring to engage in retail trade, within its territories, to be organized pursuant to Article VIII, paragraph 1.

5. The term "mineral", as used in Article VII, paragraph 2(b), refers to petroleum as well as to other mineral substances.

6. The term "financial" in Article VII, paragraph 1, and Article VIII, paragraph 1, includes banking activity. Such activity in Denmark is the activity, and that alone, which can be conducted pursuant to and under observance of the provisions in the Danish banking legislation. Applications concerning permission to establish branches of American banks in

Denmark for the conduct of banking activity as defined above will be given favorable consideration.

In the United States of America permission to inititate a banking business as defined by the applicable State and Federal laws shall be dependent on the provisions of such laws.

7. Article XII, paragraph 2, shall not be construed to prevent a Party from exercising necessary regulation over the inflow of capital pursuant to article VI, section 3 of the Articles of Agreement of the International Monetary Fund, provided that such regulation shall not as a general rule be exercised in a manner which impairs paragraphs 1 and 2 of article VII, paragraph 1 of Article VIII, or the provisions of other Articles of the Treaty.

8. The provisions of Article XVII, paragraph 2 (b) and (c), and of Article XIX, paragraph 4, shall not apply to postal services.

9. The provisions of Article XXI, paragraph 2, shall apply in the case of Puerto Rico regardless of any change that may take place in its political status.

10. Article XXIII does not apply to territories under the authority of either Party solely as a military base or by reason of temporary military occupation.

11. Notwithstanding Article XXIII, the provisions of Article XIV, paragraphs 1 and 2, and of Article XVII, shall, subject to the reservations and exceptions pertinent thereto, extend to Greenland.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed this Protocol and have affixed hereunto their seals.

DONE in duplicate, in the English and Danish languages, both equally authentic, at Copenhagen, this first day of October, one thousand nine hundred and fifty-one.

/s/ EUGENIE ANDERSON

MINUTES OF INTERPRETATION

concerning Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark signed at Copenhagen, October 1, 1951.

The following notes record the common understanding of the representatives of the United States of America and the Kingdom of Denmark with regard to certain questions of interpretation that arose during the course of negotiating the provisions of the Treaty of Friendship, Commerce and Navigation between the two countries signed this day:

ad Articles VII and VIII:

The word "commercial" as used in Article VII, paragraph 1, and Article VIII, paragraph 1, and the word "professional" as used in Article VII, paragraph 3, do not extend to the fields of navigation and aviation. The word "commercial" relates primarily but not exclusively to the buying and selling of goods and activities incidental thereto.

ad Article VII, paragraph 1:

It is understood that either Party may, consistently with the terms and intent of the Treaty, apply special requirements to alien insurance companies with a view to assuring that such companies maintain standards of accountability and solvency comparable to those required of like domestic companies, so long as such requirements do not have the effect of discrimination in substance against such alien companies.

ad Article VIII, paragraph 1:

It is understood that either Party may consistently with the terms of this paragraph, maintain special requirements with respect to the residence or nationality of the founders, members of the boards of directors, and managing directors of companies constituted under its laws.

ad Article XI:

Nothing in this Treaty shall be construed to supersede any provisions of the convention between the United States of America and the Kingdom of Denmark for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, signed May 6th, 1948.

ad Article XIV, paragraph 4:

It shall be sufficient for the purposes of subparagraph (c) if the information and views mentioned therein are imparted in the course of appropriate multilateral discussions (as pursuant to the General Agreement on Tariffs and Trade) in which both Parties participate.

ad Article XIX, paragraph 2:

The word "flag" in Article XIX, paragraph 2, shall also comprise a reference to the Faroese flag.

Ad paragraph 6 of the Protocol:

The provisions of paragraph 6 of the Protocol do not imply discriminatory measures against duly authorized banking enterprises.

(sign.) *E. A.*

NOTEVEKSLING VEDRØRENDE ARTIKEL VII, STK. 3.

THE FOREIGN SERVICE OF THE
UNITED STATES OF AMERICA.

No. 49.

Excellency,

With reference to the treaty of friendship, commerce and navigation between the United States and Denmark, signed at Copenhagen on October 1, 1951, I have the honor to inform you that the Senate on July 21, 1953, gave its advice and consent to the ratification of the said treaty in a resolution as follows:

> „Resolved, (Two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive I, Eighty-second Congress, second session, a treaty of friendship, commerce, and navigation between the United States of America and Denmark, together with a protocol relating thereto, signed at Copenhagen on October 1, 1951, subject to the folowing [sic] reservation, which shall be agreed to by the other high contracting party before ratifications are exchanged:
>
> „Article VII, paragraph 3, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions."

It will be observed that by this resolution the advice and consent of the Senate to the ratification of the treaty are given subject to a reservation to the provision that concerns the practice of professions.

It is the hope of my Government that your Government will find acceptable the reservation which the Senate has made a condition of its advice and consent to the ratification of the treaty. An acknowledgment of this note prior to the exchange of ratifications accepting by direction and on behalf of your Government, the said reservation will be considered as completing the acceptance by the two Governments of that reservation.

Copenhagen, August 5, 1953.

(sign.) JOHN O. BELL.
Chargé d'Affaires ad interim.

His Excellency
Ole Bjørn Kraft,
Minister of Foreign Affairs,
Copenhagen.

MINISTRY OF FOREIGN AFFAIRS.

Monsieur l'Ambassadeur,

As it is the intention of the Danish Government to ratify in the near future the treaty of friendship, commerce and navigation between the United States and Denmark, signed at Copenhagen on October 1, 1951, I have the honour to refer to the Embassy's note No. 49 of August 5, 1953, which reads as follows:

„With reference to the treaty of friendship, commerce and navigation between the United States and Denmark, signed at Copenhagen on October 1, 1951, I have the honour to inform you that the Senate on July 21, 1953, gave its advice and consent to the ratification of the said treaty in a resolution as follows:

„Resolved, (Two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of Executive I, Eighty-second Congress, second session, a treaty of friendship, commerce, and navigation between the United States of America and Denmark, together with a protocol relating thereto, signed at Copenhagen on October 1, 1951, subject to the following reservation, which shall be agreed to by the other high contracting party before ratifications are exchanged:

„Article VII, paragraph 3, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions."

It will be observed that by this resolution the advice and consent of the Senate to the ratification of the treaty are

given subject to a reservation to the provision that concerns the practice of professions.

It is the hope of my Government that your Government will find acceptable the reservation which the Senate has made a condition of its advice and consent to the ratification of the treaty. An acknowledgment of this note prior to the exchange of ratifications accepting by direction and on behalf of your Government, the said reservation will be considered as completing the acceptance by the two Gowernments [sic] of that reservation."

During previous discussions between this Ministry and your Embassy it has been agreed that the reservation of the Senate, if accepted by the Danish Government, is mutual in its effect and operative equally upon each party and thus constitutes an identical reservation on the part of the Danish Government.

In view of this understanding I have the honour to confirm that my Government find acceptable the reservation made by the Senate of the United States. I am in agreement with the Embassy's suggestion that the above-mentioned note of August 5, 1953 and the present reply constitute an integrating part of the treaty of friendship, commerce and navigation between Denmark and the United States of America.

I avail myself of this opportunity to renew to you, Monsieur l'Ambassadeur, the assurance of my highest consideration.

Copenhagen, January 26, 1960.

(sign.) J. O. KRAG.

His Excellency
Mr. Val Peterson,
Ambassador of the United States of
America,
Copenhagen.

The Ministry of Foreign Affairs hereby confirms that the above is a true copy of the "Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of Denmark", incl. Minutes of Interpretation, signed October 1, 1951 in Copenhagen.

MINISTRY OF FOREIGN AFFAIRS

For the Minister
b.a.
Julie Rechnagel
JULIE RECHNAGEL

KINGDOM OF DENMARK
CITY OF COPENHAGEN
EMBASSY OF THE UNITED
STATES OF AMERICA } ss

I, Mildred J Hall, Consul of the United States of America at Copenhagen, Denmark, duly commissioned and qualified, do hereby certify that Julie Rechnagel whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was on the 22 day of April 1981, the date thereof an official of the Danish Foreign Ministry duly commissioned and qualified, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Embassy at Copenhagen, Denmark this 22 day of April 1981

Mildred J. Hall
Consul of the
United States of America

APPENDIX B

MINISTRY OF FOREIGN AFFAIRS

File No. R.I.3.S.123/8

Statement of the Danish Government concerning the interpretation of the Treaty of Friendship, Commerce and Navigation between the Kingdom of Denmark and the United States of America, signed on 1 October 1951

During 1980 and 1981 the Danish Government has on several occasions informed the Government of the United States of America of its interpretation of the above mentioned Treaty, particularly in connection with the case Linskey v. Heidelberg Eastern, Inc., 470 F. Supp. 1181 (E.D.N.Y. 1979), leave to appeal denied, Civ. 79-8475 (2d Cir. Jan. 23, 1980). The position of the Danish Government in this regard can be summarized as follows:

The Danish Government is of the opinion that under Article VII (4), seen in conjunction with Article VIII (1) of the Treaty, Danish companies which control and manage enterprises established or acquired in the United States according to Article VIII (1) are entitled to engage Danish nationals in positions such as specified in Article VII (4). American companies, of course, enjoy the equivalent right in Denmark. This interpretation is not only expressly underlined by the use in Article VII (4) of the words ". . . employees of their choice, regardless of nationality . . .", but is likewise mandated if the right provided in Article VIII (1) to control and manage enterprises in the territories of the other Party is to remain unimpaired.

As to the question of the applicability of Article VII (4) to companies constituted under Article VIII, the minutes of interpretation attached to the Treaty state re Article VIII, paragraph 1:

"It is understood that either Party may consistently with the terms of this paragraph, maintain special requirements with respect to the residence or nationality of the founders, members of the boards of directors, and managing directors of companies constituted under its laws".

In the view of the Government of Denmark this interpretative statement leaves no doubt that it was the intent of the negotiators that the right to engage personnel regardless of nationality as stipulated in Article VII (4) would apply also to companies constituted under Article VIII, subject to the reservation agreed upon in the minutes of interpretation. Otherwise the said minutes of interpretation re Article VIII (1) would have no meaning.

This understanding of the relevant treaty provisions is furthermore borne out by the fact that the right to control and manage enterprises established or acquired within the territory of the other Party, cf. Article VIII (1), would, in the nature of things, be of practically no value if the company in control were not granted the right to engage personnel of its own nationality at the executive level. The unitary structure of Article VII and VIII further supports this conclusion.

This interpretation of the Treaty does not in any way imply that under the U.S.-Danish Treaty of Friendship a foreign company may disregard all domestic discrimination laws relating to employment, for instance in regard to race, religion, age, sex, etc. What the Treaty provides, however, is that locally incorporated subsidiaries of Danish or United States corporations basing themselves on pertinent business considerations shall have the right to make employment decisions concerning executive level personnel irrespective of the nationality of the employee.

Copenhagen, December 23, 1981

Tyge Lehmann
Head of Division
Legal Department
Ministry of Foreign Affairs

KINGDOM OF DENMARK
CITY OF COPENHAGEN
EMBASSY OF THE UNITED
STATES OF AMERICA } ss

I, JOSEPH ST. JOHN, VICE CONSUL of the United States of America at Copenhagen, Denmark, duly commissioned and qualified, do hereby certify that TYGE LEHMANN whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was on the 23rd day of DECEMBER 1981, the date thereof AN OFFICIAL OF THE DANISH MINISTRY OF FOREIGN AFFAIRS duly commissioned and qualified, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Embassy at Copenhagen, Denmark this 28th day of DECEMBER 1981

Joseph A. St. John
American Vice Consul

Best Copy Available

The following is a photocopy of the Danish Ministry Letter dated December 23, 1981 printed herein at pages 31a-33a

MINISTRY OF FOREIGN AFFAIRS

File No. R.I.3.S.123/8

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This interpretation of the Treaty does not in any way imply that under the U.S.-Danish Treaty of Friendship a foreign company may disregard all domestic discrimination laws relating to employment, for instance in regard to race, religion, age, sex, etc. What the Treaty provides, however, is that locally incorporated subsidiaries of Danish or United States corporations basing themselves on pertinent

business considerations shall have the right to make employment decisions concerning executive level personnel irrespective of the nationality of the employee.

Copenhagen, December 23, 1981

Tyge Lehmann
Head of Division
Legal Department
Ministry of Foreign Affairs

KINGDOM OF DENMARK
CITY OF COPENHAGEN
EMBASSY OF THE UNITED
STATES OF AMERICA } ss

I, JOSEPH ST. JOHN, VICE CONSUL of the United States of America at Copenhagen, Denmark, duly commissioned and qualified, do hereby certify that TYGE LEHMANN whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was on the 23rd day of DECEMBER 1981, the date thereof AN OFFICIAL OF THE DANISH MINISTRY OF FOREIGN AFFAIRS duly commissioned and qualified, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the Embassy at Copenhagen, Denmark this 28th day of DECEMBER 1981

Joseph A. St. John
American Vice Consul

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 80-2070; 81-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,

Petitioner & Cross-Respondent,

—v.—

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,

Respondents & Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE JAPAN EXTERNAL TRADE ORGANIZATION AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE JAPAN EXTERNAL TRADE ORGANIZATION AS AMICUS CURIAE

The Japan External Trade Organization ("JETRO") submits this brief as *amicus curiae* in support of the position of petitioner and cross-respondent, Sumitomo Shoji America, Inc. This brief is filed with the written consent of the parties pursuant to Rule 36 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

JETRO is a non-profit organization incorporated under the laws of Japan and owned by the Government of Japan. It was established in 1958 under a special law for the purpose of facilitating and promoting Japan's trade relations with other countries. JETRO maintains offices in the United States and throughout the world. Its activities include market research, data dissemination, export and import promotion, and overseas public relations work. In recent years JETRO has considerably expanded the scope of its efforts in regard to international economic cooperation, import promotion and overseas investment. Through its activities JETRO has acquired considerable knowledge and experience with respect to Japanese direct investment in the United States that may assist the Court in its consideration of this case.

INTRODUCTION

JETRO is concerned about the implications of the instant case for the future of Japanese direct investment in the United States. Specifically, JETRO fears that an affirmance of the decision of the court below will tend to discourage such mutually beneficial investment insofar as that decision imposes the strictures of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1978) (hereinafter "Title VII") to limit the right of Japanese investors to control and manage their enterprises in the United States with home country executive personnel of their choice, as authorized by Article VIII(1) of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863 (1953) (hereinafter the "Treaty"). The primary purpose of the present brief is to provide the Court with factual information regarding Japanese direct investment in the United States and to demonstrate how the decision of the court below imperils the future of such investment in direct contradiction of the Treaty's overall purpose.

SUMMARY OF ARGUMENT

The instant case is of direct concern to Japanese investors because of its potential impact on their ability to control and manage their enterprises in the United States with home country executives and other specialists of their choice. The decision of the court below is incompatible with the Treaty's overall purpose of encouraging foreign direct investment and will likely have a chilling effect on future Japanese investment in the United States. Private sector direct investment in the United States by Japanese investors has grown rapidly in recent years, increasing from $152 million in 1973 to some $4.2 billion as of the end of 1980. JETRO believes that Japanese direct investment in the United States, which has been actively encouraged by U.S. federal and state government officials, has been of substantial mutual benefit to the United States and Japan. Among other things, this private investment helps lessen trade friction, and has led to hundreds of thousands of new jobs for American workers.

An interpretation of the Treaty that gives plenary effect to Article VIII(1) is entirely compatible with the policies underlying Title VII and will not foster employment discrimination by U.S.-based Japanese concerns. The overly broad reading of Title VII by the court below improperly and unnecessarily limits the right of Japanese investors to employ Japanese key personnel of their choice as provided by the Treaty, and thus imperils the basis for mutually beneficial foreign direct investment in the United States.

ARGUMENT

I.

THE DECISION OF THE COURT BELOW IS INCOMPATIBLE WITH THE TREATY'S OVERALL PURPOSE OF ENCOURAGING FOREIGN INVESTMENT AND THUS IMPERILS JAPANESE DIRECT INVESTMENT IN THE UNITED STATES WITH ADVERSE CONSEQUENCES FOR THE AMERICAN ECONOMY.

The treaty at bar is one of a series of friendship, commerce and navigation ("FCN") treaties designed to encourage and facilitate foreign private investment in the host country. One of the chief architects of the modern FCN treaty has written:

> In a real sense . . . the FCN treaty as a whole *is* an investment treaty; not a mosaic which merely contains discrete investment segments. It regards and treats investment as a process inextricably woven into the fabric of human affairs generally; and its premise is that investment is inadequately dealt with unless set in the total "climate" in which it is to exist.

Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 244 (1956).

From the point of view of the United States, the overall purpose of the Treaty is to promote and protect private American investment in Japan. *See* 99 Cong. Rec. 9312 *et seq.* (1953). At the same time, because of the reciprocal nature of FCN treaties, *see id.* at 9312-13, the Treaty's overall purpose necessarily includes the promotion of Japanese private investment in the United States.

The Fifth Circuit recognized the Treaty's intent to promote Japanese investment interests as "self-evident", concluding that the goal of American negotiators in formulating Article VIII(1), *i.e.* to safeguard the right to free choice of technical

and managerial personnel in order to maintain control of private investments abroad, was also "the goal of Japanese negotiators who sought it to protect Japanese companies operating in the United States." *Spiess v. C. Itoh & Company (America), Inc.*, 643 F.2d 353, 362 (5th Cir. 1981). The court below likewise noted that the Treaty "is a commercial agreement designed to encourage trade and investment in the United States and Japan." *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552, 554 (2d Cir. 1981). Its holding, however, tends to frustrate that design by undercutting the ability of Japanese investors to control the key personnel who manage their investments in the United States. As the following discussion shows, the chilling effect on Japanese direct investment in this country will be widespread—as will the adverse consequences for the American economy, which derives substantial direct and indirect benefits from such investment—if this Court adopts the holding of the court below.

A. The Accelerating Pace of Japanese Direct Investment

A recent study by the Japan Economic Institute of America indicates that Japanese investors had a controlling investment in 213 U.S. manufacturing companies at the end of 1980. *See* S. MacKnight, *Japan's Expanding Manufacturing Presence in the United States: A Profile,* 2 (Japan Economic Institute of America [1981]) (hereinafter cited as the "JEI Profile"). At that time, U.S. manufacturing companies owned by or affiliated with Japanese investors (including companies in which Japanese investors held a substantial minority interest) had a total of 314 plants in operation or under construction. *Id.* The vast majority of these U.S. companies are owned entirely by one or more Japanese corporations, either directly or indirectly through another U.S. affiliate.

The growth of Japanese direct investment in the United States is a relatively recent phenomenon. At the time the Treaty was concluded, per capita income in Japan was a mere $188 per annum, lower than that in many developing countries. *See*

Patrick and Rosovsky, *Japan's Economic Performance: An Overview,* in H. Patrick and H. Rosovsky, *Asia's New Giant: How the Japanese Economy Works,* 11 (The Brookings Institution, 1976) (hereinafter cited as *"Asia's New Giant"*). The Japanese nation focused its concern on basic subsistence and on the reconstruction of basic industries devastated by World War II. At the time negotiations for the Treaty began, Japan was still under Allied occupation, a status which did not terminate formally until April 28, 1952. *See id.* The United States was, of course, the dominant occupying power and the dominant factor as well in Japan's external economic relations. *See* W. Hunsberger, *Japan and the United States in World Trade,* 51 (Council on Foreign Relations, 1964). In 1952, the United States provided approximately two-thirds of Japan's imports, *id.,* and American private investment accounted for some 70 per cent of total foreign investment in Japan. Hearing before the Subcommittee on Commercial Treaties of the Committee on Foreign Relations, United States Senate, 83d Cong., 1st Sess. 27 (1953). It was only in 1964 that Japan received "developed country" status as a member of the Organization for Economic Cooperation and Development. *See* Krause and Sekiguchi, *Japan and the World Economy,* in *Asia's New Giant,* at 426. As late as 1973, Japanese direct investment in the United States totalled only $152 million. Japan External Trade Organization, *Japanese Manufacturing Operations in the United States,* 8 (1981).

Since 1973, however, the growth of Japanese investment in the United States has been significant. A recent study by JETRO shows that Japanese direct investment in the United States grew to a total of $4.2 billion by the end of 1980—a 28-fold increase in seven years. During the same period, Japan's share of the world's total direct investment in the United States rose to 6.4 per cent from 0.7 per cent. While Japan's share of U.S. investment in 1980 still trailed that of such long-established investor nations as the Netherlands (24.7 per cent) and the United Kingdom (17.3 per cent), it exceeded that of Switzerland (5.6 per cent) and France (4.1 per cent) and

continues to grow at an accelerating pace. U.S. Department of Commerce, *Survey of Current Business* (August 1980), *cited in Japanese Manufacturing Operations in the United States, supra* at 8-9 (hereinafter cited as the "JETRO Survey").

There are several reasons for this rapid increase in Japanese direct investment in the United States. Most notably, some firms which formerly did business in the United States only by export activities have transferred manufacturing and other business operations here because of business considerations such as the prospect of assuring supplies of raw materials and parts, convenience to markets, and the ability to upgrade repair and after-sales service. JETRO Survey at 22-23. Moreover, with the rapid increase in Japanese wages and other manufacturing costs over the past decade, the differential between overall manufacturing costs in Japan and in the United States has narrowed. This narrowed differential in costs, together with the continued appreciation of the yen, has facilitated direct investment. JETRO Survey at 9, 11.

In many cases, the principal factor motivating Japanese direct investment in the United States has been concern about trade frictions and, in specific cases, limitations on the importation of various Japanese manufactured products, including, for example, color television sets and automobiles. JEI Profile at 2. It is JETRO's experience that Japanese firms have received strong encouragement and, in some cases, considerable pressure from state and federal officials in the United States to establish manufacturing subsidiaries in this country. *Cf.* JETRO Survey at 60-62. In an effort to maintain sound and healthy economic relations with the United States, Japanese firms have been responding to such encouragement in a very positive way, as the direct investment figures show.

JETRO firmly believes that Japanese direct investment in the United States is of great benefit to both countries. As the Assistant Secretary of the United States Treasury for International Affairs noted in recent testimony before the Congress:

> U.S. policy traditionally has welcomed to the United States foreign investment that enters our economy in response to market forces. In our opinion, this open investment climate has served us well. Throughout our history foreign investment has created jobs for U.S. workers, broadened U.S. capital markets, and contributed to U.S. productivity and economic growth. At the present time, investment in the United States, both foreign and domestic, is critical to the revitalization of our economy.

Statement of the Honorable Marc E. Leland, Assistant Secretary of the Treasury for International Affairs, before the Subcommittee on Commerce, Consumer and Monetary Affairs, Committee on Government Operations, House of Representatives, *quoted in* Treasury News, 1 (September 23, 1981). An interpretation of the Treaty which gives the full intended effect to the free choice provision of Article VIII(1) will foster a climate in which foreign investment can continue to flourish.

B. Direct and Indirect Employment of Americans As a Result of Japanese Investment

The growth of Japanese investment in the United States results in substantial direct and indirect benefit to the American economy. One factor of crucial interest to both Americans and Japanese is the positive effect of Japanese-owned enterprises on the employment of American citizens. A 1979 study for the Japan Society conducted by the Columbia University Conservation of Human Resources Project found that in 1978, Japanese-owned enterprises in the United States employed approximately 10,500 Japanese nationals and provided jobs directly for approximately 81,300 Americans—a one-to-eight ratio. Japan Society, Inc., *The Economic Impact of the Japanese Business Community in the United States, 1979,* 1-2 (Public Affairs Series 10) (hereinafter cited as *"Economic Impact"*). Furthermore, the operations of those enterprises result in an estimated additional 261,000 jobs for American workers. *Id.* at 1, 34-36. Since 1978, the number of new

Japanese manufacturing facilities in the United States has grown. *See* JETRO Survey at 19. The number of Japanese-owned manufacturing facilities beginning production in the United States each year rose from 15 during 1977 and 18 during 1978 to 31 during 1979 and 30 during 1980. JEI Profile at 2. Thus, it may be inferred that the number of Japanese-created jobs for American citizens has risen significantly since 1978.

Although the number of Americans directly employed by Japanese general trading companies in the United States is limited (some 4,800 non-Japanese as against some 3,300 Japanese were employed in such entities in 1978), *see Economic Impact* at 10, 20, the Columbia University study points out that Japanese general trading companies account for the indirect employment of some 143,300 Americans through the $3.9 billion in American exports which they handle. *Id.* at 34. Thus Japanese general trading companies in the United States have had a multiplier effect on the employment of Americans on the order of 44 to 1.

The ratio of Americans to Japanese directly employed by Japanese-owned firms varies considerably from industry to industry. In manufacturing firms, the number of American employees at both the blue collar and the executive levels is very high compared to the number of Japanese, a ratio of 28 to 1. *Economic Impact* at 21. In the case of general trading companies (*sogo shosha*), the ratio is lower (1.4 to 1). *Id.* The reason for this is not only that blue collar workers generally are not needed in such organizations, but also that local nationals do not have the special training and knowledge required for managerial and other key positions. Executives qualifying for these positions must understand sophisticated questions of international trade, finance, transportation and investment; they must know the Japanese market, customers, goods, culture and language, and they must be familiar with the company's headquarters and with the worldwide organization; they must have the knowledge necessary to carry on constant liaison with the home office and with customers through computer-

controlled communications systems connected with their headquarters and their affiliated offices. *See generally,* Krause and Sekiguchi, *Japan and the World Economy, supra* at 389-96.

The foregoing statistics dramatize the positive impact that Japanese enterprises of all kinds in the United States have had on the employment of American citizens. The decision of the court below would dilute that impact by discouraging Japanese direct investment. By construing Article VIII(1) of the Treaty as granting all such enterprises the right to hire the personnel of their choice for key positions, this Court can assure that the investment-fostering purpose of the Treaty is fully realized, to the maximum intended benefit of the American domestic economy.

II.

AN INTERPRETATION OF THE TREATY THAT GIVES PLENARY EFFECT TO ARTICLE VIII(1) IS ENTIRELY COMPATIBLE WITH THE POLICIES UNDERLYING TITLE VII AND WILL NOT FOSTER EMPLOYMENT DISCRIMINATION BY U.S.-BASED JAPANESE FIRMS.

The case before the Court is of direct concern to all Japanese foreign investors and doubtless to many other present and potential foreign investors in the United States. At issue is the relationship between two distinct and important sets of public policies: those favoring the liberal flow of international trade and investment between the United States and its treaty partners, and those concerned with the elimination of employment discrimination in American society. JETRO believes that these two sets of policies are entirely compatible and that there is no necessity for this Court to favor one to the detriment of the other.

Seen in proper perspective, the realities of Japanese enterprise militate against any danger of discrimination against non-Japanese nationals as a result of giving plenary effect to the free choice provision of Article VIII(1) of the Treaty. First, it should be noted that only a small percentage of the employ-

ees at Japanese-owned manufacturing affiliates are Japanese nationals sent from parent companies. Thus, among 175 such U.S. concerns polled by JETRO in 1980, only 1,126 of the employees, or 2.5 per cent, were Japanese. JETRO Survey at 37. Moreover, those U.S.-based firms that engage a higher percentage of Japanese personnel generally do so only during the initial phase of their American existence, and the tendency is to reduce the number of such personnel once normal production is under way. *Id.* at 38. Japanese personnel are concentrated in second-level managerial positions, where they provide assistance to top management on matters of finance, production and technology; other such personnel are sent from the parent company on a temporary basis, for example, to give technical advice during busy seasons or under other special circumstances. *Id.* at 37.

There is no evidence that the use of Japanese personnel in a limited number of specialized positions works to exclude or to reduce the number of American citizens from Japanese enterprises in the United States. On the contrary, the trend appears to be running in favor of increased hiring of American personnel for the top management positions of such enterprises. The JETRO survey of Japanese firms indicates a conviction among such firms that highly experienced American executives, who are perceived as strong leaders by American workers, are preferable to Japanese executives for the top management positions of American-based firms. *See* JETRO Survey at 67. Additionally, the prospect of discrimination against American personnel becomes even more remote in view of the documented concern of Japanese firms for maintaining harmonious relations with local communities, a concern which has been exhibited by activities such as participation in local volunteer activities, contributions to public welfare projects and schools, and the active recruitment of handicapped individuals. *See id.* at 62-63.

The notion that a liberally construed Article VIII(1) could be used to favor Japanese nationals over American personnel in a discriminatory manner pales in the face of the careful screen-

ing process employed by U.S. consular officials in Japan before issuing visas to non-immigrant treaty trader executives. It is JETRO's understanding that, in making the determination as to whether such a Japanese national may enter the United States, the American visa-granting authority considers such matters as the job title involved, the level of compensation, the location of the job within the structure of the employing company, the nature of the duties involved, the degree of control and responsibility that the candidate will exercise, the number and skills of the candidate's prospective subordinates, and the present level of the candidate's executive or supervisory skills. *Cf.* 8 U.S.C. § 1101(a)(15)(E)(i) (1970); 22 C.F.R. § 41.40(a), (b) (1981). Clearly, then, there is adequate protection to assure that the granting of treaty trader status to Japanese nationals is confined to the special categories of managerial and technical personnel enumerated in Article VIII(1) of the Treaty.

Finally, in JETRO's view, the court below erred by making Title VII applicable to personnel covered by Article VIII(1) of the Treaty because, as a matter of law, the standards of Title VII do not apply to the grant of treaty trader status. This Court has previously held that, while Title VII prohibits discrimination based upon national origin, a hiring practice that is based upon nationality does not run afoul of Title VII. *See, e.g., Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973). The preference for home-country personnel allowed by Article VIII(1) is based solely on nationality and does not amount to invidious discrimination based on national origin.

The decision of this Court in the case at bar will have a significant impact on the future of Japanese and other foreign direct investment in the United States. The executives whose jobs are placed in question by this case are non-immigrant Japanese nationals who enter and are employed in the United States on the basis of treaty trader visas authorized by the reciprocal provisions of the FCN treaty between the United States and Japan. An interpretation of Title VII which would limit the right of Japanese companies to send such key person-

nel to manage investments made here—whether in branch or subsidiary form—appears to go far beyond the purpose of Title VII. The heart of the matter, seen from the point of view of a potential foreign investor, is whether, based on an expansive and unintended reading of Title VII of the Civil Rights Act of 1964, foreign investors will lose the right to manage and control their foreign investments with key personnel of their choice and become obliged to appoint to executive or specialist positions persons of any nationality who claim they are "qualified" for such positions. Such a loss of control would without doubt dampen substantially the willingness of foreign firms to do business in the United States through local establishments.

CONCLUSION

For all of the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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MOTION FILED
JAN 21 1982

Nos. 80-2070, 81-24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC.,
Petitioner and Cross-Respondent,

v.

LISA M. AVIGLIANO, DIANNE CHENICEK, ROSEMARY T. CRISTOFARI, CATHERINE CUMMINS, RAELLEN MANDELBAUM, MARIA MANNINA, SHARON MEISELS, FRANCES PACHECO, JOANNE SCHNEIDER, JANICE SILBERSTEIN, REIKO TURNER and ELIZABETH WONG,
Respondents and Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY OF THE GOVERNMENT OF JAPAN, *AMICUS CURIAE*

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January 18, 1982

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Leave to File *Amicus Curiae* Brief

Pursuant to Rule 36(3) of the Rules of this Court, the Ministry of International Trade and Industry of the Government of Japan moves for leave to file the attached brief as *amicus curiae* to bring its views to the attention of the Court concerning the important questions presented by this case. Petitioner and cross-respondent, Sumitomo Shoji America, Inc., has consented to the filing of this brief; the respondents and cross-petitioners have not.

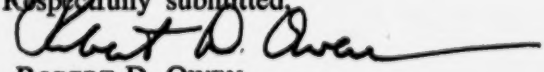
Japanese law entrusts to the Ministry of International Trade and Industry broad responsibility and authority on behalf of the Government to adopt and implement Japan's

international trade and economic policies. Tsushosangyosho Secchi Ho (Ministry of International Trade and Industry Establishment Law), Law No. 275 of 1952 (as amended), Articles 3(1) and 4(19). The Court's resolution of this matter will be extremely important to the future course of private Japanese direct investment in the United States, which is an important element in the economic relationship of the United States and Japan.

The Ministry wishes to ensure that the Court is fully apprised of its view that the issues herein presented are important to bilateral economic cooperation between Japan and this country, and only a direct submission by the Ministry, in the form of the annexed *amicus curiae* brief, will so ensure.

For the reasons stated and in the interests of strengthening bilateral economic cooperation between Japan and the United States, the Ministry of International Trade and Industry of the Government of Japan respectfully requests that the Court receive and consider the attached brief.

Respectfully submitted,



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BRIEF OF THE MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY OF THE GOVERNMENT OF JAPAN, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The Ministry of International Trade and Industry of the Government of Japan ("MITI") welcomes the opportunity to present to the Supreme Court of the United States its views regarding certain issues involved in *Sumitomo Shoji*

America, Inc. v. *Avigliano, et al.*, Nos. 80-2070 and 81-24, now before the Court. MITI, having broad responsibility for Japan's international trade and economic relations, offers this Statement in the interests of strengthening bilateral economic cooperation through mutually beneficial direct investment.

Summary of Statement

Japanese direct investment in the United States is an important element in the improvement of bilateral economic relations: such investment supplies needed capital, productive technology and jobs, and it contributes to the reduction of bilateral trade frictions between our two countries. The process of direct investment is sensitive to the investment climate in the United States. A critical element of that investment climate is the ability of foreign direct investors to manage and control their establishments in the United States with their own managerial personnel. The Ministry of International Trade and Industry supports the position of Sumitomo Shoji America, Inc. in this case because it believes that a decision by the Court upholding the management rights of foreign investors would contribute positively to a continued favorable investment climate and to mutually beneficial economic relations.

Statement of the Ministry of International Trade and Industry

1. This case is of the greatest importance to future private Japanese direct investment in the United States. A decision impairing the ability of Japanese investors to employ executives of their choice to manage and control their enterprises in the United States would impede and

could well reduce the future volume of such private direct investment.

2. The steady increase of Japanese direct investment in the United States not only benefits private investors but also results in great benefit for both the United States and Japan. Japanese direct investment in the United States has steadily increased, reaching approximately $4.2 billion as of the end of 1980, according to data published by the United States Department of Commerce.[1] According to Japanese government statistics, on the basis of investment permits and investment reports filed with the Government, Japanese direct investment in the United States reached approximately $8.9 billion as of the end of March 1981.

Also, according to the United States Department of Commerce, Japanese direct investment in the United States resulted in the direct employment of approximately 95,000 individuals as of 1979.[2] If employment resulting indirectly from such investment is included, the total employment created amounts to nearly 350,000 persons.[3] Such Japanese direct investment is helping to revitalize certain United States industrial sectors and contributes favorably to the reduction of the problem of the trade imbalance. For such reasons, MITI believes that the importance of Japanese

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[1] United States Department of Commerce, Survey of Current Business, August 1981, at 47.

[2] United States Department of Commerce, Survey of Current Business, May 1981, at 50.

[3] Japan Society, Inc., *The Economic Impact of the Japanese Business Community in the United States, 1979,* Public Affairs Series 10 (hereinafter "Economic Impact Study"), at 1-2. This study, done for the Japan Society by the Conservation of Human Resources Project, Columbia University, found that as of 1978 Japanese companies in the United States employed 10,500 Japanese and 81,300 Americans and indirectly created an additional 261,000 jobs for Americans through their purchase of goods and services. *Id.* at 1.

direct investment in the United States will continue to grow.

As the report to the President of the United States and the Prime Minister of Japan by the Japan-United States Economic Relations Group emphasized, the free flow of investment capital is as important as the free flow of trade in promoting economic efficiency. Such efficiency means, internationally, the availability to consumers of inexpensive, high quality goods and the opportunity for domestic firms to expand their markets abroad. Domestically, such efficiency means the improvement of productivity, more effective employment of labor and capital, and the achievement of economies of scale conducive to economic growth.[4] An indication of the value of Japanese direct investment is that many State governments have actively solicited and encouraged Japanese direct investment within their borders in the belief that such investment will contribute to their economic development.

Similarly, from the Japanese perspective, direct investment in the United States plays a most important role in helping to maintain and develop markets, in alleviating trade frictions and in overcoming various domestic production constraints.

Accordingly, MITI considers that such direct investment is beneficial to both countries and looks forward to its further smooth expansion.

3. In order to encourage further appropriate expansion of direct investment in the United States by Japanese firms MITI believes it is essential to continue to maintain a favorable investment climate. In that connection, MITI con-

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[4] Supplemental Report of the Japan-United States Economic Relations Group, October 1981, at 11, 33.

siders that the ability of Japanese investors to dispatch executive employees from Japan to manage and control their overseas subsidiaries is of the greatest importance and indeed is a basic prerequisite for the successful management of their overseas business activities.

If the Court's decision in this case should appear to impair that ability, it is foreseeable that investors will be greatly concerned, and such concern could become a major impediment to further direct investment in the United States, not only by Japanese firms but by foreign firms generally.

While Japanese direct investors are concerned about their ability to appoint managers for their overseas enterprises, it should be pointed out that Japanese companies operating in the United States, consistent with the practice of their entirely domestic counterparts, employ large numbers of Americans. The ratio of American to Japanese employees varies from industry to industry, being higher in manufacturing firms and lower, of course, in firms such as trading companies (of which Sumitomo is an example), not only because of the absence of blue collar workers, but also owing to the necessity for executives to be thoroughly familiar with such matters as the Japanese market, customers and business practices.[5] Indeed, the qualification of Japanese employees who are to be sent to the United States is subject to strict examination by the United States authorities as part of the review of their visa applications.

4. A decision in the instant case that would impair the existing right of Japanese companies to dispatch executive employees to manage and control their subsidiaries in the

[5] The ratio of Americans to Japanese directly employed by Japanese-owned firms are as follows: in the case of trading companies, 1.4 to 1; for manufacturing enterprises, 28 to 1; for all Japanese enterprises, 8 to 1. Economic Impact Study, *supra*, n.3, at 21.

United States would, in MITI's view, tend to discourage direct investment to the detriment of both the United States and Japan. It is our sincere hope that the Court will consider fully the implications of this case for Japanese and other foreign investors and will reach a decision favorable to the continuation of mutually advantageous foreign direct investment in the United States.

Conclusion

For the reasons stated above the Ministry of International Trade and Industry of the Government of Japan submits this statement in support of the interests of Japanese direct investors in the United States as represented in this case by Sumitomo Shoji America, Inc.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *AMICUS CURIAE*

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BRIEF FOR NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *AMICUS CURIAE*

I. Statement of Interest

The N.A.A.C.P. is the nation's oldest and largest civil rights organization. It is organized, *inter alia*, to protect and expand the employment opportunities of black persons. With the proliferation of foreign-owned/operated companies and subsidiaries in the United States, the N.A.A.C.P. has a specific and intense interest that these generally be held subject to the same standards of non-discrimination in

employment relationships and terms as are American businesses. The case at bar raises the issues of: (1) whether wholly-owned foreign subsidiaries, organized under American law, are to be exempt from the coverage of Title VII and, if not, (2) whether any protection afforded, *inter alia*, blr k persons by Title VII will be watered down in light of the asserted interests or needs of such wholly-owned subsidiaries. While we agree with the conclusion on the first issue reached by the Circuit Court below, we believe that its formulation of the standard to be applied in determining whether Sumitomo may use national origin as a *bona fide* occupational qualification (bfoq) is considerably broader than justified by Title VII and would, if adopted, substantially vitiate the protections provided by that statute.*

II. Statement of the Case

We adopt respondent *Avigliano, et al.'s*, statement of the case and its analysis of the inapplicability of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063 ("The Treaty") to wholly-owned subsidiaries incorporated in the United States.**

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* Our concern is heightened by the decision of the Fifth Circuit in *Speiss* v. *C. Itoh & Co.*, 25 FEP Cases 849, 855 (1981), which held, we believe erroneously, that "it is irrelevant whether the source of potential interference with that right (of Japanese companies to manage their own affairs) is state legislation characterized as 'ultranationalistic' or a federal statute labeled 'progressive.'" Surely this is incorrect; the effect of Article VIII, as a shield to prevent the operation of state laws which would have barred the employment of *any* Japanese worker, however qualified, does not entail the conclusion that the same provision may be used as a sword to justify affirmative discrimination where same is not justified under Section 703(e).

** We agree with the conclusions reached by both Courts below that "the effect of the Treaty is to assure that nationals of one

III. Summary of Argument

Assuming that this Court affirms the Second Circuit's conclusion that Sumitomo, as a wholly-owned subsidiary, falls within the compass of the Treaty, the company should not thereby receive blanket exception to Title VII. The "of their choice" language in Article VIII of the Treaty is not made superfluous by the application of Title VII to such entities. Instead, the language negotiated in 1953 evidences an intent to protect foreign companies from the reach of the prevalent restrictions against the employ of non-citizens within the bounds of certain American states. To permit this provision, meant to insure more equitable employment practices, now to work a discriminatory result against American workers would conflict with the purposes of the Article itself, as well as compromise the crucial national purposes advanced by Title VII.

Applying Title VII to Sumitomo carries as well the exception to non-discrimination codified in Section 703(e) of Title VII which permits an employer to recognize bfoqs and hire accordingly. In guiding the district court on the issue of what constitutes a showing of "business necessity", justifying discrimination in hiring, the Second Circuit gave impermissively great weight to the acceptability of female workers to "those persons with whom the company or branch does business," and to Japanese "customs." This "Hecklers' veto" standard should not be identified as co-equal with factors which bear directly on the company's capacity to hire persons able to perform essential business functions.

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party are not discriminated against within the territory of the other." 473 F. Supp. 506, 509 (S.D. N.Y. 1979); Slip op. at 638 F.2d 553, 555 (2d Cir. 1981).

IV. Argument

A. *The 1953 Treaty Sought to Ease Barriers to the Entry of Japanese Workers, Not to Exempt Japanese Subsidiaries From American Civil Rights Laws*

By 1953 Congress had not extended specific civil rights protections by statute to minority or women workers. It is difficult, therefore, to argue, as does petitioner, that the draftees of the 1953 Japanese-American commercial treaty intended to override the application of such statutes to Japanese businesses. Moreover, as respondents have shown, Article VIII was designed specifically to override certain state prohibitions against the employment of Japanese aliens. The employment provisions of the Treaty eliminated discrimination, and did not contemplate granting broad exceptions to civil rights legislation like Title VII. See H. Walker, *Companies,* Chapter 7 in R.R. Wilson, *United States Commercial Treaties and International Law,* 182, 197-198 (1960); Steiner & Vaghts, *Transnational Legal Problems,* 37-38 (Foundation Press, 1968).

The burden of proving that Title VII intended such broad exceptions lies with petitioners and in light of section 703(e)'s recognition of *bona fide occupational qualifications,* it is difficult to understand why Congress would have *sub silentio* intended Title VII not to apply across-the-board to foreign corporations or their subsidiaries. It makes more sense to conclude that Title VII applies to all employers not specifically excepted on its face and requires that any specific circumstances of business necessity which might justify employment discrimination be substantiated on a case-by-case basis.

B. *Sumitomo Should Be Required to Meet the Same Rigorous Standards for Invocation of the BFOQ as Any Other Employer Covered by Title VII*

By passing Title VII, Congress endorsed two central propositions: (1) that our national economy would be enhanced by eradicating artificial stereotypic obstacles to equal treatment by employers and (2) that personal fulfillment and actualization must be protected against the application of *per se* rules disqualifying persons from employment or conditioning employment due to impermissible factors not essentially related to those skills demanded by a particular job. *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Usery* v. *Tamiani Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

Since the earliest interpretations of the bfoq exception, courts have guarded against permitting expansive factors to negate the central purposes. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 546 (Marshall, J.). In a society rife with discriminatory and stereotypic attitudes, it has been recognized that allowing customers' biases to define who may/may not be acceptable in certain jobs would invite the emasculation of Title VII. As the Supreme Court noted in *Dothard, supra,* the

> virtually uniform view of the federal courts is that §703(e) provides only the narrowest of exceptions to the general rule requiring equality of employment opportunities.
>
> The care with which Congress had chosen the words (of section 2000e-2(e)) to emphasize the function and to limit the scope of the exception indicate that it had no intention of opening the kind of enormous gap in the law which would exist if [for example] an employer could legitimately discriminate against a group solely because his *employees, customers* or clients, dis-

> criminated against that group. Absent much more explicit language such a broad exception should not be assumed for it would largely swallow up the Act.

65 Mich. L. Rev. (1966), quoted in *Diaz* v. *Pan Am. World Airways, Inc.*, 442 F.2d 385, 387 (5th Cir. 1971).* Consistently, *Diaz* rejected Pan Am's argument that, since its passengers preferred female stewardesses to male stewards, it could exclude all men from such roles on domestic flights. See also, *Wilson* v. *Southwest Airlines Co.*, 26 EPD §31.949 (ED Texas 1981). Likewise, the EEOC has always narrowly interpreted the *bfoq* provision, specifically rejecting its predication upon the preferences of co-workers, possible customers and the like. 29 C.F.R. 1604.1(a), *et seq.*

Apart from upholding Title VII against the prejudices of potential business clientele, the courts have required employers to *particularize* their need to discriminate and not merely to elicit general testimony in support of pervasive favoritism. *Swint* v. *Pullman Standard*, 624 F.2d 525, 534 (5th Cir. 1980). Thus a foreign company seeking to exclude women accountants who have minimal client contact on the basis that their employ would violate traditional customs has *not* made the requisite showing of business necessity. The latter demands evidence specifically linking the operation of the bfoq to the actual delivery of safe and efficient business services. *Burrell* v. *Eastern Airlines, Inc.*, 633 F.2d 361, 370 (4th Cir. 1980). (". . . the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be no acceptable alternative policies or practices which would better accomplish the business purposes advanced . . .").

---

* The *Diaz* court used even stronger language in holding inapposite such biases, ". . . it would be totally anomalous if we were to allow the preference and prejudices of customers to determine whether the sex discrimination was valid." (*Id.* at 389).

The Ninth Circuit recently had occasion to deal with the precise issues now before this Court in *Fernandez* v. *Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981). The district court had found that a company doing business in Latin and South America could exclude women from executive roles, concluding: "whatever views Americans may hold regarding business and social customs, it was not merely for convenience of itself or its customers that Wynn Oil refused to consider a woman for that position. To have hired Ms. Fernandez, regardless of her qualifications, would have *totally* subverted any business Wynn hoped to accomplish in those areas of the world." *Id.*, 20 FEP cases 1163 (CD Cal. 1979).

Despite the apparent definitiveness of the district court's factual conclusions, the Ninth Circuit reversed stating:

> The district court found that sex discrimination must be compelled by business considerations in order to qualify as a BFOQ. It also stated that customer preference should not be bootstrapped to the level of business necessity. Nevertheless, it held that customer preferences rise to the dignity of a *bona fide* occupational qualifications if "no customer will do business with a member of one sex because it would destroy the essence of the business or would create serious safety and efficacy problems." On this basis, the district court found the customer preferences of Wynn's clients a BFOQ.
>
> That conclusion cannot stand. Title 42 U.S.C. §2000e-2(c) permits hiring decisions to be based on gender if gender is a bfoq reasonably necessary to the normal operations of that particular business. *However, stereotypic impressions do not qualify gender as a BFOQ. City of Los Angeles Department of Water* v.

> *Manhart*, 435 U.S. 702, 707 (1978). *See Blake* v. *City of L.A.*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 445 U.S. 28 (1980). Nor does stereotyped customer preference justify a sexually discriminatory practice. (Citations omitted). (emphasis added).

And, directly on point, the Circuit chastized the District Court's distinction of *Diaz, supra*, which rested on the assertion of a separate rule of bfoqs in international contexts. "Such a distinction," the Ninth Circuit held, "is unfounded. Though the United States cannot impose standards of nondiscrimination on other nations through its legal system, the district court's rule would allow other nations to dictate discrimination in this country. No foreign nation can compel the non-enforcement of Title VII here."

Likewise, this Court should instruct the Second Circuit to revise its standards on bfoq to ensure that matters relating to stereotype, rather than capacity to perform, play no part in any bfoq determination. Specifically, and with respect to plaintiffs before this Court, no inquiry should be permitted into the "acceptability [of women as a class] to those persons with whom the company or branch does business." Finally, whatever degree of knowledge and skill a district court requires of these female plaintiffs should be required of men currently holding the positions which the women sought.

C. *Sumitomo's Discrimination on the Basis of Sex and National Origin Is Prohibited by Title VII*

While admitting that "it prefers Japanese nationals, as opposed to nationals . . . of all other countries," (Brief of Petitioner at 17), petitioner suggests that this is not a discrimination based on national origin. And, while conceding the male-dominated nature of its executive work

force, petitioner claims that this is not the result of discrimination based on sex. Indeed, petitioner claims that *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973) and *Morton* v. *Mancari*, 417 U.S. 535 (1974) "are dispositive" of the issues raised by this case as they allegedly evidence this Court's approval of discrimination based on "national origin". In fact, neither case supports petitioner's position, and *Espinoza* reiterates Title VII's prohibition of discrimination based, as is Sumitomo's, on national origin in the absence of the particularized BFOQ showings discussed *infra*.

In *Espinoza*, petitioner challenged Farah's longstanding policy to hire only American citizens. Farah, an American company, proved that over 95% of the employees at the plant where Mrs. Espinoza applied for work were Mexican-Americans, rebutting any suspicion of national origin-based discrimination. This Court, Marshall, J., held that discrimination based upon American *citizenship* was not actionable under Title VII. "Aliens are protected from illegal discrimination under the Act (Title VII), but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage." 414 U.S. at 95. To the contrary, respondents expressly claim that Sumitomo limited their opportunities for advancement on the basis of their *sex* and *national origin*, both of which, unlike alienage and citizenship, are expressly prohibited classifications under Title VII. *Cf. Dowling* v. *United States*, 476 F.Supp. 1018 (D. Mass. 1979) (district court rejected hockey referee's claim of discrimination based on citizenship requirement). Unlike Farah, which showed a pattern of hiring persons of Mexican origin, Sumitomo has not demonstrated, and respondents cannot show, that its promotion practices are consistent with the proscriptions of Title VII. It is this

issue which must be tried on remand, using an appropriate BFOQ standard.

Likewise, *Morton* v. *Mancari*, 417 U.S. 575 (1974) offers petitioners no support; therein, this Court upheld a long-standing preference in both hiring and promotion by the Bureau of Indian Affairs for native-Americans. Writing for a unanimous Court, Justice Blackmun found this preference served several important national purposes: "to give Indians greater participation in their own self-government; to further the government trust obligation toward the Indian tribes and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life." *Id.* at 542. Moreover, Congress specifically had exempted Indian employment preferences from the initial coverage of Title VII and this Court perceived no legislative intent to change these policies through the 1972 amendments to Title VII. Only by perverted logic can *Morton*, a case reiterating protection accorded to an insular and unique minority, be construed to justify discrimination against women.

In short, Sumitomo has not differentiated its discriminatory practices from those expressly prohibited by Title VII. Now admitting that Title VII extends to its practices, Sumitomo must meet the rigorous requirements of the BFOQ standard and justify its apparent and absolute requirements of gender and national origin for *executive* positions.

V. Conclusion

For the reasons set forth above, the decision below should be affirmed with instructions to modify the standards for adjudging bfoq suggested therein.

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Nos. 80-2070; 81-24

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ON WRIT OF CERTIORARI TO
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BRIEF AMICUS CURIAE OF SHELL PETROLEUM N.V.

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PRELIMINARY STATEMENT

Shell Petroleum N.V. ("SPNV") files this amicus brief with the consent of both parties in order to put before the Court

certain views with respect to the standing of a wholly owned United States subsidiary of a Japanese parent company to assert the rights conferred on a Japanese company by Article VIII(1) of the Treaty of Friendship, Navigation and Commerce between the United States and Japan to engage executive personnel of its choice. That question was ruled upon by the Second Circuit in *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), and the Fifth Circuit in *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353 (5th Cir. 1981). SPNV files this amicus in protection of certain rights conferred on it by the Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of The Netherlands signed at The Hague, March 27, 1956, 8 U.S.T. 2643, T.I.A.S. No. 3942. SPNV does not support either party to this action.

INTEREST OF AMICUS CURIAE

Shell Petroleum N.V. ("SPNV") is a company organized under the laws of the Kingdom of The Netherlands with certain subsidiary corporations operating in the United States. SPNV holds certain rights vested in it by the Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of The Netherlands, signed at The Hague, March 27, 1956, 8 U.S.T. 2043, T.I.A.S. No. 3942 ("the Netherlands FCN Treaty") which may be affected by the decision herein.

SPNV has its principal place of business in The Hague. Sixty percent of the equity shareholdings in SPNV are held by N.V. Koninklijke Nederlandsche Petroleum Maatschappij (Royal Dutch Petroleum Company), a company incorporated in The Netherlands. The remaining forty percent equity shareholding in SPNV is held by The "Shell" Transport and Trading Company, Limited, a company incorporated in England. SPNV and an affiliated Royal Dutch/Shell company hold investments in over 900 Royal Dutch/Shell companies located in over 100 countries.

SPNV includes among its holdings approximately 69% of the outstanding shares of common stock of Shell Oil Company

("Shell Oil"), a Delaware corporation with its principal office in Houston, Texas. SPNV also owns, indirectly, all the shares of stock of Scallop Nuclear Inc. ("Scallop Nuclear"), a Delaware corporation with offices in New York.

As a foreign parent company enjoying certain treaty rights under the Netherlands FCN Treaty, SPNV has a special interest in the standing issue presented in this case. The United States has entered into Friendship, Commerce and Navigation Treaties with numerous countries. Those Treaties define varying specific substantive rights and, with similar variation, vest those rights, *inter alia,* in foreign "nationals", foreign "companies", "enterprises" controlled by foreign companies, "enterprises" in which foreign nationals hold an interest and other entities. As a foreign parent company protected by one of such Treaties, SPNV believes that it can present views not heretofore expressed which may be of use to the Court in resolving the standing issue presented.[1]

SUMMARY OF ARGUMENT

The various substantive provisions of the many Friendship, Commerce and Navigation Treaties vest substantive rights in various entities, including nationals of the Treaty parties, companies of the Treaty parties, enterprises controlled by nationals and companies of the Treaty parties and enterprises in which such companies or nationals have substantial interests. The entities on which the rights are conferred vary among the various substantive provisions. To determine whether it is appropriate to treat a United States subsidiary as entitled to assert the Treaty rights conferred upon Japanese companies, an analysis should be made of the wording of the substantive provision under consideration, the policy underlying that substantive provision, its history and the characteristics of the subsidiary. Accordingly, this Court should limit its decision in this case to the question whether a United States subsidiary of a Japanese company is entitled to assert the executive personnel

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[1] SPNV does not address any issues going to the merits of the present action.

choice rights of Article VIII(1) and refrain from ruling upon the vesting in subsidiaries of rights conferred by the Treaty on Japanese nationals in the many other substantive provisions of the Treaty.

ARGUMENT

The purpose of the Friendship, Commerce and Navigation Treaty of 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863 ("the Japanese FCN Treaty") was to strengthen trade and commerce between the United States and Japan. To advance this purpose, the Japanese FCN Treaty defines various substantive rights and vests them in various entities.

The Japanese FCN Treaty uses a number of terms of art in identifying the entities in which it vests substantive rights in its various provisions, including "nationals", "companies of either party", "enterprises controlled by such nationals and companies" and "enterprises in which nationals and companies of either party hold an interest". The language of the various Japanese FCN Treaty provisions identifying the entity in which particular substantive rights are vested is not uniform. It varies from provision to provision and it must be assumed that the drafters acted purposefully in drafting those varying provisions.

The specific issue presented to the courts below was whether wholly owned United States subsidiaries of Japanese companies were to be treated as "companies of either party" for purposes of determining whether such subsidiaries may assert the right to engage executive personnel of their choice granted by Article VIII(1) to "companies of either party". Unfortunately, neither the Fifth nor the Second Circuit decided that specific issue. Rather, both appear to have taken the position that wholly owned United States subsidiaries of Japanese companies are to be treated as Japanese companies generally.

That, we respectfully, suggest, is an untenable and overly broad conclusion, inconsistent with many different substantive provisions of the Japanese FCN Treaty. The drafters of the Japanese FCN Treaty purposefully differentiated among the

various substantive provisions of the Treaty in identifying the entity in which the Treaty right is vested. While it may make perfectly good sense to conclude that a wholly owned United States subsidiary should be treated as a Japanese company for purposes of the "free choice" provision of Article VIII(1), it may not make any sense so to treat a United States subsidiary in the context of other substantive provisions.

Further problems arise from the fact that a foreign corporation and a U.S. entity in which it has an interest may not agree on the exercise of particular Treaty rights. These situations can and do arise even where the foreign corporation is a majority shareholder because of the obligation of the board of directors of the U.S. company to serve the interests of all of its stockholders. In such circumstances, it may become necessary to decide whether the particular right resides in the foreign parent, the U.S. company, or both. In other circumstances, vesting such rights in a U.S. subsidiary may bind the foreign parent in ways incompatible with the underlying Treaty right. Recognizing that the U.S. subsidiary can exercise certain Treaty rights does not preclude the exercise of the corresponding rights by the foreign parent where the Treaty vests such rights in the parent. Accordingly, an informed decision concerning whether to vest a Treaty right conferred upon a foreign company in its U.S. subsidiary will in many cases depend upon an analysis of the relationships between the parent and the subsidiary in the context of the particular rights involved.

CONCLUSION

The determination of whether a subsidiary is entitled to invoke the Treaty rights of its parent should depend on the underlying policies of the particular provision, and not on general definitional rules. To determine whether it is appropriate to treat a U.S. subsidiary as entitled to assert the Japanese FCN Treaty rights conferred upon Japanese companies, an analysis should be made of the wording of the provision under consideration, the policy underlying that substantive provision, its history, the characteristics of the subsidiary, and the policy that underlies the countervailing obligation against which the Treaty right is asserted. The consideration of these factors will lead to the conclusion that some Treaty provisions that refer to "companies of either party" should apply to U.S. subsidiaries, and other provisions should not. This Court should not reach out to decide issues which have not been developed in the record below. In matters of taxation, importation, nationalization and the many other subjects covered by Friendship, Commerce and Navigation Treaties, the respective rights of foreign parents and U.S. subsidiaries are at present unclear and cannot be resolved without full consideration of the particular substantive rights involved and the factual situations in which those rights are asserted. Accordingly, SPNV respectfully suggests that the Court limit its ruling to the question whether a United States subsidiary wholly owned by a Japanese company may assert the right to engage executive personnel of its choice conferred by Article VIII(1) of the Japanese FCN Treaty.

Respectfully submitted,

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Respondents and
Cross-Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* MICHAEL E. SPIESS, *et al* IN SUPPORT OF LISA M. AVIGLIANO, *et al*

INTEREST OF THE *AMICUS CURIAE*

This Brief is submitted by Michael E. Spiess, Jack K. Hardy, Benjamin F. Rountree and the other members of the multiple nationwide classes certified under FED. R. CIV. P. 23(b)(2) by the district court in *Spiess* v. *C. Itoh & Company (America), Inc.* 469 F.Supp. 1 (S.D. Tex. 1979), *rev'd*, 643 F.2d 353 (5th

Cir. 1981), *rehearing en banc granted*, 654 F.2d 302 (Aug. 7, 1981), *order granting rehearing en banc vacated*, No. 79-2382 (Dec. 9, 1981). Although important differences exist between the *Spiess* case and the case now under consideration by this Court, both cases involve interposition of the Treaty of Friendship, Commerce and Navigation between the United States and Japan, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863 (the "Treaty" or the "FCN Treaty") as an alleged bar to claims of national origin discrimination under Title VII of the civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, (1976) ("Title VII"). With respect to the Treaty defense, Spiess et al stand in substantially the same position as Ms. Avigliano and the other Respondents and Cross-Petitioners in the case now before the Court.

Plaintiffs in the *Spiess* case prevailed on the Treaty issue in the district court. The Fifth Circuit reversed the district court in a split decision and ordered plaintiffs' case dismissed. The Fifth Circuit then granted rehearing *en banc*, vacating the prior 2-1 panel opinion against plaintiffs. While the *Spiess* case was awaiting *en banc* rehearing by the Fifth Circuit, this Court granted certiorari in the *Avigliano* case. C. Itoh & Company (America), Inc. ("Itoh-America") then filed a Motion to Stay Further Proceedings before the Fifth Circuit pending a decision by this Court in *Avigliano*. The Motion to Stay was unopposed by plaintiffs. In response to the Motion to Stay, the Fifth Circuit vacated its Order requiring the case to be reheard *en banc* and reinstated the 2-1 panel opinion in favor of Itoh-America. On February 10, 1982, plaintiffs in the *Spiess* case filed a Petition for Certiorari with this Court. The Petition was docketed in this Court as No. 81-1496.

SUMMARY OF THE ARGUMENT

Sumitomo Shoji America, Inc.'s ("Sumitomo") claim that it has an "unqualified right" to discriminate against persons of non-Japanese national origin rests on Articles I(1), VII(1) and

VIII(1) of the FCN Treaty. Article I(1) applies only to persons, not companies, and therefore confers no rights whatever on Sumitomo. Article VII(1) applies to both Sumitomo and its Japanese parent. However, the rights conferred by Article VII(1) are limited by the "national treatment" standard of Article XXII(1). Thus, under Article VII(1), Sumitomo is clearly not entitled to the preferential treatment it seeks. Attention is therefore focused on Article VIII(1), which provides that companies of Japan are entitled to engage, within the territory of the United States, personnel of their choice. As pointed out by Fifth Circuit Judge Reavley in his dissenting opinion in *Spiess* v. *C. Itoh & Company (America), Inc.*, 643 F.2d 353 (5th Cir. 1981), United States incorporated subsidiaries of Japanese companies are companies of the United States rather than companies of Japan under the Treaty. Sumitomo, being a company of the United States, therefore falls outside the scope of whatever rights may be conferred by Article VIII(1). Spiess et al respectfully adopt Circuit Judge Reavley's dissent and urge that it is the most cogent and persuasive analysis yet written concerning the FCN Treaty rights of United States incorporated subsidiaries of companies of Japan.

Even assuming, however, that Article VIII(1) applies to Sumitomo, it is clear that the Treaty was not intended to create an island of Japanese immunity within the United States. Bestowing immunity from Title VII on United States incorporated subsidiaries of Japanese corporations is contrary to the initial interpretation of Article VIII(1) by both parties, and is further contrary to the subsequent practice of both parties. In addition, such immunity is contrary to the Charter of the United Nations and to United States policy toward multinational corporations.

ARGUMENT

I. ARTICLE VIII(1) OF THE TREATY, UPON WHICH SUMITOMO'S CLAIM TO IMMUNITY RESTS, DOES NOT APPLY TO UNITED STATES INCORPORATED SUBSIDIARIES OF JAPANESE COMPANIES.

A. Article VIII(1) Is the Cornerstone of Sumitomo's Alleged "Unqualified Right" to Discriminate.

Simply stated, Sumitomo argues that it has the "unqualified right" to discriminate against employees of non-Japanese national origin, derived from the interaction of Articles I(1), VII(1) and VIII(1) of the Treaty. Article I(1) permits entry into the United States of Japanese managerial personnel, referred to as "treaty traders". By permitting entry of such personnel, however, Article I(1) merely effectuates whatever rights are bestowed by Articles VII(1) and VIII(1). It confers no substantive rights *on Sumitomo*. The reason for this is that legal entitles such as Sumitomo are not as such entitled to treaty trader status. Article I(1) of the Treaty speaks of "Nationals" of either party, in contradistinction to "Nationals and companies" as used in Articles VII(1) and VIII(1). Similarly, the Immigration and Nationality Act of 1952 ("I&N Act"), which is also relied upon by Sumitomo and which provides for a specific means of entry of Japanese managerial personnel into the United States, speaks of "nonimmigrants" and "nonimmigrant aliens". 8 U.S.C. §§1201(a)(2) & §§1201(a)(15)(1970). This underlines the uncontested fact that Sumitomo, as such, does not itself have any "unqualified right", or indeed any other right, under Article I(1) of the Treaty. The mere right of an individual to enter the United States in furtherance of international commerce engaged in by his employer does not itself purport to confer on that employer a right to immunity from the application of United States anti-discrimination laws.

Article VII(1) is equally unsupportive of Sumitomo's alleged unqualified right to discriminate. That Article confers rights on

two distinct groups of beneficiaries. However, as will be seen below, Article VII(1) accords neither group of beneficiaries immunity from United States law.

The first group of beneficiaries is described in the first sentence of Article VII(1) as "Nationals and companies of . . . [one] . . . Party . . . engaging in business activities within the territories of the other Party, . . ." Under that sentence, such nationals and companies are entitled to "national treatment". The second group of beneficiaries is described in the third (last) sentence of Article VII(1) to consist of enterprises *controlled by* nationals and companies of the other party. Under the third sentence of Article VII(1), such controlled enterprises are entitled to "treatment no less favorable than that accorded like enterprises controlled by nationals and companies of . . . [the] . . . other Party." Sumitomo Shoji Kabushiki Kaisha (hereinafter referred to as "Sumitomo-Japan"), Sumitomo's Japanese parent, being a company of Japan, is in the first group of beneficiaries. Sumitomo itself, being a company controlled by a company of Japan, is clearly within the second group of beneficiaries.

The "national treatment" standard applicable to the first group of beneficiaries, *i.e.*, to companies of Japan as opposed to companies which they control, is defined by Article XXII(1) as:

> . . . treatment accorded within the territories of a Party under terms no less favorable than the treatment accorded therein, in like situations, to nationals . . . [and] . . . companies . . . of such Party.

This "national treatment" standard as it relates to *companies of Japan* (as opposed to companies which they control) is slightly modified by Article XXII(4), which provides:

> National treatment accorded under the provisions of the present Treaty to companies of Japan shall, in any State, Territory or possession of the United States . . ., be the treatment accorded therein to companies created or

> organized in other States, Territories, and possessions of the United States . . . .

Thus, the drafters of the Treaty drew a distinction between companies of Japan on the one hand, and enterprises which they control on the other. While the two categories of benefits conferred by Article VII(1) have "national treatment" as a common denominator, the treatment accorded to "companies of Japan" is subject to more qualifications than that accorded to enterprises controlled by such companies. As is demonstrated below, the right to "national treatment" is no grant of a privilege to disobey valid domestic laws of the host country.

Article VII(1) was construed in *United States v. R. P. Oldham Company*, 152 F.Supp. 818 (N.D. Cal. 1957). As the Court there said:

> Although ... [Article VII of the Treaty] ... equates domestic subsidiaries with their foreign parents, it does so only for purposes of that Article, which has the effect of according nationals of one party engaging in business within the territory of the other party the same treatment accorded nationals of the other party. For example, an American subsidiary of a Japanese parent is to have the same rights as any domestically owned American corporation. The Article nowhere attempts to give greater rights to such subsidiaries.

152 F.Supp. at 823-24.

This construction of Article VII(1) as it relates to enterprises controlled by companies of Japan is supported by the tabular treaty comparison incorporated into the record of hearings on the FCN Treaty before the Subcommittee of the Committee on Foreign Relations. The following tabulation is part of the tabular comparison just mentioned:

Approved Treaties	Proposed Treaties	
Uruguay	Israel	Japan
Article VI(2): *National treatment* for local companies, controlled by nationals and companies of the other party, engaging in activities listed in Article VI(1).	Article VII(1): Same in substance.	Article VII(1): Same as Israel provision.

"Commercial Treaties", *Hearings before the Subcommittee of the Committee on Foreign Relations, United States Senate*, 83d Cong., 1st Sess., July 13, 1953, at p. 9. (Emphasis added.) Thus, under Article VII(1), Sumitomo, as a "local" company controlled by a company of Japan, is entitled to "national treatment", nothing more, nothing less.

This result would not materially change even if Sumitomo were assumed to be a *company of Japan* for Article VII(1) purposes. The portions of Article VII(1) dealing with the entitlements of companies of Japan operating within the United States are contained in the first two sentences of that section. They read as follows:

> Nationals and companies of either Party shall be accorded *national treatment* with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. *Accordingly*, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies *under the general company laws of such other Party*, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. [(Emphasis added.)]

The standard thus prescribed for companies of Japan is "national treatment", and this standard governs the second sentence as well, which starts with the word, "Accordingly". The specific contents of the benefits listed in sentences 1 and 2 are

thus subject to the "national" legislation of the host country, *i.e.*, the United States.

As stated in the *Oldham* case, "[t]he tenor of the entire Treaty is *equal* treatment to nationals of the other party, not *better* treatment. 152 F.Supp. at 822 & 823. (Emphasis in original.) The portion of the *Oldham* case just quoted is reproduced in the digest of that case in 6 M. WHITEMAN, DIG. OF INT'L L., 148, 149 & 150 (1968), which is the current and most recent official compilation of United States practice in international law.

This interpretation of Article VII(1) is supported by Dr. Herman Walker, who formulated the post World War II form of friendship, commerce and navigation treaty and negotiated many such treaties. As Dr. Walker has written:

> Traditionally, the standard of "national treatment" for the activities of natural persons has been written into United States commercial treaties so that such persons are enabled freely to go about their affairs *without discriminatory burdens or harassments*. A salient characteristic of the treaties of the period since 1946, therefore, has been the explicit extension to company activity of *the same long-established principle*. These treaties (with such exceptions and qualifications as will be mentioned below) thus *assure to companies of either party equality of treatment with companies of the other party*, with respect to engaging in all ordinary business activities, commercial, industrial and financial. This principle applies to both the initial establishment of an enterprise (the entry into the activity) and to the terms and conditions under which the company is entitled subsequently to conduct its enterprise (carry on the activity).

H. WALKER *Companies*, Ch. VII, in R. R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW, 182, 197-98 (1960). (Emphasis added.)

The same view of the matter is held by Professor Dan F. Henderson of the University of Washington, the leading authority on the legal aspects of Japanese-United States trade relations. After setting forth the full text of Article VII, Professor Henderson writes:

> The straightforward provisions established the rights of U.S. citizens to "national treatment" in the establishment and operation of businesses in Japan *and vice versa*, and the apparent purpose is to accord the "foreign enterprise" the *same* rights, *duties*, and privileges, legally, as those enjoyed by domestic business.

D. F. Henderson, *Foreign Enterprise in Japan, Law and Policies* 274 (1973). (Emphasis added.)

This proposition is accepted by Japanese commentators as well. Thus, in discussing the application of certain trade secret disclosure rules of the Japanese Commercial Code to the acquisition of corporate shares through exchanges of property, Professor Fujita has written: "This is a domestic law applicable to the Japanese as well. Therefore, there is no violation of the 'national treatment' clause." Fujita, *Does Japan's Restriction on Foreign Capital Entries Violate Her Treaties?* 3 LAW IN JAPAN 162, 172 note 29 (1969).

Article I(1) applies to individuals, not to companies, and Article VII(1) is limited by the "national treatment" standards of Article XXII. Thus, neither Article I(1) nor article VII(1) supplies Sumitomo with the preferential treatment it seeks. Attention is thus focused on Article VIII(1).

B. Sumitomo Is a Company of the United States for Purposes of Article VIII(1) of the Treaty and Is Thus Entitled to No Greater Rights Than Any Other United States Company.

That portion of Article VIII(1) upon which Sumitomo's claim to immunity rests provides that *"Nationals and companies of either Party* shall be permitted to engage, *within the territories of the other Party* . . . . executive personnel and other specialists

of their choice." (Emphasis added.) Stated otherwise, in terms applicable to Sumitomo's claim to immunity, a *company of Japan* is entitled to engage within the territory of the United States, personnel of its choice. The pivotal inquiry thus becomes the nationality of Sumitomo, since if Sumitomo is a company of the United States rather than of Japan, it falls outside the scope of Article VIII(1) for purposes of this case.

In *Spiess* v. *C. Itoh & Company (America), Inc.*, 469 F.Supp. 1 (S.D. Tex. 1979), *rev'd* 643 F.2d 353, (5th Cir. 1981), *rehearing en banc granted*, 654 F.2d 302 (Aug. 7, 1981), *order granting rehearing en banc vacated*, No. 79-2382 (Dec. 9, 1981), Spiess et al briefed at considerable length the question whether Itoh-America is a company of the United States or a company of Japan for Article VIII(1) purposes. The dissenting opinion of Fifth Circuit Judge Reavley (643 F.2d at 363) held that Itoh-America is a company of the United States rather than a company of Japan, and therefore falls outside the scope of Article VIII(1). Sumitomo, like Itoh-America, is a United States corporation wholly owned by a company of Japan. Judge Reavley's analysis is therefore equally applicable to Sumitomo, and Spiess et al adopt it and respectively direct this Court's attention to it as the most cogent and scholarly analysis yet written concerning the Article VIII(1) FCN Treaty rights of United States incorporated subsidiaries of companies of Japan.

C. The Administrative Determination of Corporate Nationality for "Treaty Trader" Purposes Does Not Alter the Conclusion That Sumitomo Is A Company of the United States and Is Thus Entitled to No Direct Benefits Under Article VIII(1) of the Treaty.

Article I(1) of the Treaty, which allows Japanese nationals to enter the United States for the purpose of carrying on trade, is statutorily implemented by 8 U.S.C. §1201(a)(2)(1970), which provides that under the conditions of the I&N Act or "regulations issued thereunder", United States consular officers may

issue visas to nonimmigrants as defined in 8 U.S.C. § 1101(a)(15) (1970). Subsection (E)(i) of this latter provision defines nonimmigrant aliens to include aliens entitled to enter the United States under a treaty of commerce and navigation for the purpose of carrying on substantial trade between the United States and the foreign state of which the alien is a national.

These "treaty trader" and "treaty investor" provisions are implemented by State Department Regulations codified in 22 C.F.R. 41.40 and 41.41 (1979), respectively. 22 C.F.R. 41.40 provides, in part, that an alien is classifiable as a treaty trader if he will be employed in the United States by an organization which is principally owned by a person or persons having the nationality of the treaty country. However, this administrative determination of corporate "nationality" is strictly limited in purpose to a specific requirement for the issuing of treaty trader visas pursuant to United States immigration legislation and regulations adopted in connection therewith. *Matter of N.....S.....*, I. & N. 426 (1957). It is connected to the Treaty only through the statutory requirement that the applicant be a national of a country with which the United States has a treaty of commerce and navigation.

The limited scope of the administrative determination of corporate nationality *for treaty trader purposes* is further demonstrated by the July 23, 1952 cable from Secretary of State Dean Acheson to the United States Embassy in Tokyo, which is reproduced in Appendix 1 to this Brief. The cable states that Article XXII(3) of the Treaty:

> ... establishes that whether or not a juridical entity is a "company" of either Party, for *treaty* purposes, *is determined solely by the place of incorporation.* Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded. [(Emphasis added.)]

It is apparent from the date and contents of the cable that it was intended to be communicated to the Japanese negotiators of the Treaty, which was eventually signed on April 2, 1953.

The same position was taken by the State Department in the telegrams which are reproduced in Appendices 2 and 3 of this Brief. As shown in Appendix 2, the Embassy originally informed the Japanese Ministry of Foreign Affairs "as to view of U.S. that nationality of a majority of the stockholders constitutes the nationality of the company". However, the incorrectness of that position was expressly noted in a State Department response to the Tokyo Embassy dated January 9, 1976, signed by Secretary of State Henry Kissinger. (Appendix 3). Thus, it is the official United States position, expressed by Secretary of State Acheson in 1951 and reiterated by Secretary of State Kissinger in 1976, that under the Treaty, a company has the nationality of the place where it is established, irrespective of the nationality of the majority of its shareholders. Sumitomo is therefore a company of the United States rather than a company of Japan, and falls outside the scope of whatever rights are conferred by Article VIII(1).

II. EVEN IF SUMITOMO IS SOMEHOW COVERED BY ARTICLE VIII(1) OF THE TREATY, IT DOES NOT HAVE THE "UNQUALIFIED RIGHT" TO HIRE AND COMPENSATE PERSONS OF JAPANESE NATIONAL ORIGIN IN A RACIALLY DISCRIMINATORY MANNER, IN VIOLATION OF AMERICAN LAW PROSCRIBING DISCRIMINATION IN EMPLOYMENT.

A. The Initial Interpretation Of Article VIII(1) Indicates That It Was Intended To Prohibit Racial Discrimination, Not To Shield It.

In the article by Dr. Herman Walker entitled *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373 (1956), there is almost contemporaneous authority on the intent of the parties with respect to Article VIII(1) of the

Treaty. Dr. Walker wrote that Article VIII was a provision designed "*to prevent the imposition of ultranationalistic policies with respect to essential executive and technical personnel.*" 50 AM. J. INT'L L. at 386. (Emphasis added.)

It is unlikely that a provision designed to *prevent* imposition of "ultra-nationalistic policies with respect to essential executive and technical personnel" was intended by the parties as conferring upon each other's nationals and companies the "unqualified right" to engage in this same conduct in the face of fair employment legislation. The existence of such legislation could not have been unknown to the contracting parties during the time the Treaty was being negotiated, for in 1951, the State of New York had enacted its Human Rights Law, which expressly declared:

> It shall be an unlawful discriminatory practice:
>
> (a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

New York Executive Law, § 296(a) (first enacted by N.Y. Laws 1951, ch. 800).

Moreover, during the time the Treaty was being negotiated, and prior to the effective date of the Treaty in both countries, the parties clearly contemplated additional legislation of this general type, as is apparent from the second paragraph of the preamble of the Treaty of Peace with Japan of September 8, 1951, 3 U.S.T. 3171, which recites that:

> Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the Charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights; to seek to create within Japan conditions of stability and well-being as defined in Articles 55 and 56 of the Charter of the United Nations and

> already initiated by post-surrender Japanese legislation; and in public and private trade and commerce to conform to intentionally accepted fair practices.

This clause was drafted by the United States, and accepted by Japan without objection. 1951 IV *U.S. For. Rel.* 1024, 1025 & 1171. In Articles 55 and 56 of the Charter of the United Nations, 59 Stat. 1037, 1045-46, the members of that Organization pledge themselves to "take joint and separate action" for the achievement of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

Civil rights legislation relating to employment is one of the prototypes of action for the achievement of that goal. It follows that the parties knew, or were highly likely to be aware of, civil rights legislation then actually in effect and proscribing the type of conduct here involved; that they condemned such conduct as a matter of policy; and that Japan undertook to proscribe it by legislation while at the same time being aware of the Treaty commitment of the United States to do likewise. Thus, the most reasonable interpretation of Article VIII(1) as originally conceived is that it was intended to prevent "ultra-nationalistic" employment practices based on criteria such as race, not to create a shield against civil rights legislation proscribing such employment practices altogether.

B. The Subsequent Practice of the United States and Japan Demonstrates That the Application of Title VII to Sumitomo Does Not Violate the Treaty.

Subsequent agreements of the parties, as well as their subsequent practice, are to be taken into account in the interpretation of treaties. *Vienna Convention of the Law of Treaties*, 1969, article 31(3)(a) & (b), 63 AM. J. INT'L L. 875, 885 (1969). Although this convention is not yet in effect, its provisions are accepted as accurate statements of present-day international law. *See generally*, KEARNEY & DALTON, *The Law of Treaties*,

64 AM. J. INTL'L L. 495 (1969), and *e.g.*, the *Fisheries Jurisdiction* Cases, 1973 I.C.J. Rep. 3, 18-19 (U.K. v. Iceland); *Id.* 49, 59 (West Germany v. Iceland).

In this connection, both Japan and the United States are members of the Organization for Economic Cooperation and Development ("OECD"), established by treaty on December 14, 1960, 12 U.S.T. 1729. On June 21, 1976, the OECD Council adopted a Declaration on International Investment and Multinational Enterprises, with an Annex of Guidelines for Multinational Enterprises. (*See* 1976 *Digest of United States Practice in International Law* 518-19.) In the Declaration, the OECD members "jointly recommend to multinational enterprises operating in their territories the observance of the guidelines as set forth in the annex" thereto. *Id.* 520-24. As regards "Employment and Industrial Relations," the Guidelines provide that enterprises should "within the framework of law, . . . in each of the countries in which they operate:"

> (4) observe standards of employment and industrial relations not less favorable than those observed by comparable employers in the host country;
>
> (5) in their operations, to the greatest extent practicable, utilize, train and prepare for upgrading members of the local labor force in cooperation with representatives of their employees and, where appropriate, the relevant governmental authorities;
>
> . . . .
>
> (7) implement their employment policies including hiring, discharge, pay, promotion and training without discrimination unless selectivity in respect of employee characteristics is in furtherance of established governmental policies which specifically promote greater equality of employment opportunity; . . . .

Id. at 524. (Emphasis added.)

While the Guidelines are not legally enforceable as such, they clearly embody the policy of the member states of the OECD. They constitute, as their inclusion in the State Department's official *State Practice* volume for 1976 indicates, the "state practice" of the participating states as that term is understood in international law.

It follows that since these Guidelines constitute state practice of Japan and the United States, and since, moreover, they embody an agreement between these two countries (among others) as to policy with respect to multinational corporations, they serve as aids in the interpretation of Article VIII(1) of the Treaty. This leads to the further conclusion that the application of Title VII to the components of Japanese multinational enterprises operating in the United States does not, in the view of these countries, violate agreements existing between them. Quite the contrary, Title VII is manifestly an "established governmental polic[y] which specifically promote[s] greater equality of employment opportunity; . . . ." and as such, is fully endorsed by both the United States and Japan in a statement specifically dealing with multinational enterprises.

C. Title VII Is the Type of Legislation Contemplated and Encouraged by the Charter of the United Nations, Which Prevails Over the FCN Treaty to the Extent of Any Conflict Between the Two.

In the preamble of the Peace Treaty with Japan quoted above, Japan declared its intention to seek membership in the United Nations. On December 12, 1956, by General Assembly Resolution 1113(XI), Japan was admitted to the United Nations. Japanese Association of International Law, *Japan and the United Nations* 226, note 12. (*See* U.N. Charter, Articles 2 & 4.) It follows that the Charter of the United Nations is, so far as Japan and the United States are concerned, a treaty concluded subsequent to the coming into force of the Treaty here in issue.

The application of successive treaties relating to the same subject matter is regulated by Article 30 of the Vienna Convention of the Law of Treaties. 63 AM. J. INT'L L. at 884-85. As there stated, where (as here) all the parties to an earlier treaty are parties to a later treaty but the earlier treaty is not expressly terminated or suspended by the later one, "the earlier treaty applies only to the extent that its provisions are compatible with the later one, ..." *Id.* at Article 30(3). Moreover, Article 103 of the United Nations Charter provides:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under *any other international agreement*, their obligations under the present charter shall prevail.

59 Stat. at 1053.

Thus, the Charter of the United Nations prevails over the FCN Treaty both as *lex posterior* and as *lex superior*. The United Nations Charter, as the later, and in any event, the higher law prevailing in case of a conflict between it and the FCN Treaty, provides that one of the four stated "Purposes of the United Nations" is:

> To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

Chapter I(3), 59 Stat. at 1037.

The subject of human rights and fundamental freedoms is further dealt with in Chapter IX of the Charter, entitled "International Economic and Social Cooperation." 59 Stat. at 1045-46. Article 55, which is the initial provision of Chapter IX, provides that the United Nations shall promote universal respect for, and observance of, human rights without distinction as to race. Article 56 provides:

> All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

59 Stat. 1045-46.

There has been much dispute as to the legal significance of these provisions of the Charter. *See* SCHLUTER, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CALIF. L. REV. 110 (1973). Debate focuses primarily on the question whether Articles 55 and 56 of the Charter are "self-executing", *i.e.*, whether they are effective domestic law of the United States by virtue of the Supremacy Clause (U.S. Const., art. VI(2)), or in need of implementing legislation. The leading authority for the proposition that these provisions are not self-executing is *Sei Fujii* v. *State*, 38 Cal.2d 718, 242 P.2d 617 (1952). After observing that the Preamble of the Charter imposed no legal obligations upon member nations and created no rights in private persons, the California Court went on to state, in a much-quoted passage:

> *Although the member nations have obligated themselves* to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that *future legislative action by the several nations would be required to accomplish the declared objectives*, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

242 P.2d at 621 (Emphasis added.)

Surely, Title VII is an instance of "future legislative action by the several nations" required for transforming the obligations of the member states into binding rules of domestic law. This is demonstrated not only by the contents of Title VII itself, but also by the practice of the United States after passage of Title VII. Information describing the substance of Title VII was officially made available by the United States to the United

Nations for inclusion in the United Nations' *Yearbook on Human Rights for 1964*, see *Id.* 283 note 1, and characterized therein as "Landmark Legislation, *Id.* 283-84.

Moreover, a specific reference to Articles 55 and 56 of the Charter of the United Nations, together with an undertaking by Japan to seek to create within Japan the conditions contemplated by these provisions, was incorporated into the 1951 Peace Treaty with Japan, 3 U.S.T. 3171, at the instance of the United States. This demonstrates that the human rights clauses of Chapter IX of the Charter were deemed to be of particular significance between Japan and the United States. As the Charter of the United Nations is both the "higher law" by virtue of Article 103 thereof and, in any event, the later law in relation to the FCN Treaty, it follows that any conflict between the Treaty and Title VII must be resolved in favor of Title VII.

D. United States Policy Toward Multinational Corporations Supports the Conclusion That United States Incorporated Subsidiaries of Foreign Companies Are Subject To Title VII.

The 1976 *Digest of United States Practice In International Law*, at 505 & 506, contains two pertinent statements on multinational corporations. First, Deputy Secretary of State Robert S. Ingersoll, on March 5, 1976, stated:

> In international discussions of enterprise behavior, the United States has supported two basic principles:
>
> — First, *all sovereign states have the right to regulate the activity of foreign investors in their territory*, consistent with the minimum standards of justice called for by international law; and
>
> — Second, *investors must respect the laws of the nations in which they operate and conduct themselves as good corporate citizens of these nations*, refraining from improper interference in their internal affairs. [(Emphasis added.)]

The second pertinent statement was made by Secretary of State Kissinger at the June 21, 1976 OECD Council meeting:

> We are able to announce today the acceptance by OECD member governments of a declaration on investment. This declaration extends the cooperation which has characterized our trade and monetary relations into the area of investment. It includes:
>
> — Recommended guidelines for the activities of multinational corporations;
>
> *The United States strongly endorses this declaration and urges its widest possible adoption and observance.*

75 Dep't State Bull. 73, 76 (1976) (Emphasis added.)

As pointed out at page 15, *supra*, the Guidelines for the Activities of Multinational Enterprises, which received the strong endorsement of the United States, include several statements prescribing non-discriminatory employment policies to be followed by multinational enterprises. To the extent that the "international foreign policy of the United States" is relevant to the present context, therefore, both the principles governing that policy and the consequences deriving therefrom with respect to the employment and promotion of management-level personnel have been spelled out by officially reported high level policy statements. These statements squarely support the application of Title VII to United States-incorporated subsidiaries of Japanese companies such as Sumitomo.

Finally, Congress has recently dealt with the subject of employment discrimination by multinational corporations in the Foreign Boycotts legislation of June 22, 1977, 91 Stat. 244 and 50 U.S.C. app. §2403a (1981). Pursuant to §2403-1a, (a) (1) thereof, the President is directed to:

> ... issue rules and regulations prohibiting any United States person from complying with, furthering, or supporting any foreign boycott directed against a third country friendly to the United States through, among other things, (b) Refusing, or requiring any other person to refuse, to

> employ or otherwise discriminating against any United States person on the basis of race, religion, sex, or national origin of that person or of any owner, officer, director, or employee of such person.

The term "United States person", as used in this context, is defined to include:

> ...any United States resident or national (other than an individual resident outside the United States and employed by other than a United States person), *any domestic concern (including any permanent domestic establishment of any foreign concern)* and any foreign subsidiary or affiliate (including any permanent foreign establishment) of any domestic concern which is controlled in fact by such domestic concern, as determined under regulations of the President.

50 U.S.C. app. §2410(2) (1981). (Emphasis added.)

Sumitomo is thus a "United States person" for purposes of the Foreign Boycotts legislation. The conduct complained of in the case now before the Court would constitute a violation of that statute but for the lack of intent to act in furtherance of a foreign boycott. The lack of such intent does not mean, however, that discriminatory employment practices as described by 50 U.S.C. app. §2403-1a, (a)(1)(B) (1981) is immunized from other federal legislation in point. Clause (4) of this subsection expressly provides:

> Nothing in this subsection may be construed to supersede or limit the operation of the antitrust or *civil rights laws* of the United States [(Emphasis added.)]

The Boycott Prohibition legislation demonstrates, once more, the extreme gravity of Congressional disapproval of employment discrimination.

E. Article VIII(1) Was Not Intended to Create an Island of Japanese Immunity from United States Civil Rights Laws.

In the final analysis, Sumitomo's claim to preferential treatment is based on the words "of their choice" in Article VIII(1). As appears below, the purpose of including these words in the Treaty was to avoid "percentile" legislation which remained in effect in many states following World War II. "Percentile" legislation refers to laws imposed by many states which required a foreign employer to maintain a certain proportion of Americans in his workforce. The Foreign Service Despatch from the High Commissioner for Germany to the Department of State, No. 2529, March 18, 1954 (Appendix 4), makes clear the intent of the words "of their choice" as used in Article VIII(1). There, commenting on Article VIII(1) of the proposed German Treaty, which was identical for present purposes to Article VIII(1) of the Treaty here in issue, Carl H. Boehringer, United States Commercial Attache to Germany, stated that the major "special purpose of Article VIII(1) was to preclude the imposition of "percentile" legislation.

Sumitomo's contention that the words "of their choice" operate in addition to avoid subsequently enacted fair employment laws is simply incorrect. The critical distinction between the percentile laws in effect at the time of the Treaty's passage and the subsequently enacted fair employment laws which Sumitomo seeks to avoid is that exempting companies of Japan from percentile laws placed them on an equal footing with United States companies, whereas exempting companies of Japan from Title VII would place them in a preferred position to United States companies. This was not the intent of the Treaty's drafters.

The significance of the distinction discussed above has been explained by Dr. Herman Walker, whose writings elsewhere are heavily relied upon by Sumitomo. In 1958, Dr. Walker wrote:

> The specific content of the treatment, [provided by a treaty], at any given point of time and in connection with any given subject, is determinable *not from a reading of the treaty itself, but by reference to an [existing] exterior state of law and fact. The objective is to secure non-discrimination, or equality of treatment: a sort of "equal protection of the laws" objective.*

H. WALKER, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958). (Emphasis added.)

Dr. Walker's statement makes it clear that Article VIII(1) is best understood against the background of providing *national treatment* in order to ensure *equality of competitive opportunity*. With respect to employment in particular, the clear purpose of the Treaty was to insure that Japanese companies would not be discriminated against. It was not to put such companies in a preferred position vis-a-vis their United States counterparts.

In line with Dr. Walker's statement that the treatment afforded by a treaty, at any given point in time and in connection with any given subject, is to be determined by reference to then existing law rather than from a reading of a treaty itself, it must be remembered, as pointed out above, that in 1951, prior to the effective date of the Treaty, the State of New York (in which Sumitomo was incorporated) (App. 34a) enacted its Human Rights Law, which declared:

> It shall be an unlawful discriminatory practice:
>
> (a) For an employer, because of the age, *race*, creed, *color, national origin* or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual *or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.*

New York Executive Law, §296(a) (first enacted by N.Y. Laws 1951, ch. 800.) (Emphasis added.)

Sumitomo, at page 20 of its Brief, cites Dr. Walker for the proposition that the Treaty accords it the right to employ executive personnel of its choice on a " 'non-contingent' or unconditional basis." Attribution of such a conclusion to Dr. Walker, without further explanation, can be misleading. According to Dr. Walker, post-war treaties of friendship, commerce and navigation are organized along three basic standards of treatment: national treatment, most-favored-nation treatment, and absolute rules. National and most-favored-nation treatment are so-called "contingent standards". H. WALKER, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 811 (1958). Absolute rules, on the other hand, are often referred to as "non-contingent" standards or terms. *Id.* at 811. According to Sumitomo, the fact that the language of Article VIII(1) is couched in terms of an absolute ("non-contingent") rule rather than a contingent standard (national treatment) shows that Article VIII(1) goes beyond national treatment and provides a non-contingent rule of preferential treatment.

Appellees respectfully submit that this conclusion is incorrect. As stated by Dr. Walker with regard to absolute rules:

> An attempt to construct a treaty primarily in non-contingent terms [absolute rules] can prove self-defeating because increases in specificity spawn corresponding increases in reservations. This tends to rob the reference rules of the very definiteness it was their aim to accomplish. You agree to something concrete, but reserve your "public policy" or your "internal legislation." This is for the two-fold reason that prudent governments will wish escapes for future contingencies *and will also wish to avoid purporting to attribute to aliens independent rights placing them in a privileged status over citizens of the country.*

H. WALKER, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 812 (1958). (Emphasis added.) The Treaty was simply never intended to confer privileged status upon companies such as Sumitomo.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, EDWARD JOHN O'NEILL, JR., attorney for *amicus curiae* Michael E. Spiess, et al, do hereby certify that contemporaneous with depositing the foregoing Brief in the United States mail, addressed to the Clerk of the United States Supreme Court, that three copies of the Brief were mailed to the following counsel for Petitioner and Cross-Respondent, Sumitomo Shoji America, Inc.:

J. Portis Hicks
Wender, Murase & White
400 Park Avenue
New York, New York 10022.

EDWARD JOHN O'NEILL, JR.

APPENDIX 1

FORM DS-323
12-27-50

OUTGOING AIRGRAM

Department of State

RESTRICTED
CLASSIFICATION

2449

AMEMBASSY,

TOKYO

A-49, July 23, 1952

SUBJECT: FCN Treaty. Interpretation of Certain Provisions Embassy Despatch 269, June 19, 1952.

There follow comments on the specific questions raised in reference Despatch:

a. The analysis of this question begins with the second sentence of Article XXII, Paragraph 3, which establishes that whether or not a juridical entity is a "company" of either Party, for treaty purposes, is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority stockholders are disregarded. Under such a simple test, however, nationals of third countries could indirectly but effectively secure valuable treaty rights through taking advantage of liberal corporation laws. Thus to take a hypothetical example, citizens of country X which had refused to make a reciprocity treaty with Japan, and which was even on bad relations with Japan, might, nevertheless, enjoy unilaterally many business advantages in Japan, ordinarily accruing only to friendly treaty nations, by the device of setting up and operating through a Delaware corporation. The purpose of Paragraph 1(e) of Article XXI is to leave each party free to protect itself against such an eventuality, as it might wish, by allowing it to "pierce the corporate veil" of companies chartered under the laws of the other Party, for most treaty purposes.

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A-49, July 23, 1952

The rule of Article XXI, Paragraph 1(e) has to do with the treatment one party is obligated to accord to "companies" of the other party, such companies being as defined in Article XXII(3). The rule of the second sentence of Article VI, Paragraph 5, on the other hand, relates to "enterprises" in which such companies (or nationals) have a substantial interest. The word "enterprises" is not a synonym for "companies"; it is a much broader term, having to do with a business undertaking or establishment in the large and popular sense, regardless of juridical form, nationality, etc.

The rule of paragraph 1(e), Article XXI, has bearing on the second sentence of Article VI(5) only to the extent that the word "companies" is used therein. If an American-chartered company had a substantial interest in an enterprise in Japan, the Japanese Government would be obligated to give the treatment specified if such company were in fact American controlled, but not if such a company were controlled by nationals of third countries. The question of who controls the company is quite distinct from the question of who has what interest in the "enterprise" itself.

Thus the Japanese supposition that there is conflict between the provisions of VI(5) and XXI(1)(e) is not well grounded.

b. Article IX(1)(a) provides that Japanese nationals and companies shall have rights with respect to acquiring, using, and occupying land, structures, and other realty appropriate to the conduct of any activity in which they are entitled to engage

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pursuant to Article VII. The last sentence of Article VII(2) clearly provides for establishing and maintaining branches and agencies for the conduct of international transportation activity, which in the Department's intent covers international shipping. In order to make the last point clear, however, the Department authorizes the insertion of the words "shipping or other" before the word "transportation". Insofar, therefore, as tenure rights to wharves, warehouses, and other installations are reasonably necessary to the effective conduct of an international shipping operation, such rights are assured by Article IX(1)(a). Precisely what tenure rights may be reasonably necessary to the effective conduct of such an operation in a particular case, cannot, of course, be determined *in vacuo*; but the Department does not believe it is necessary to attempt to write more categorical language into the treaty on this point.

It should be further noted that Article XIX(3) provides for non-discrimination as to the access of vessels to ports, and to port and shipping facilities, insofar as such access is afforded to any international shipping on an other than tenure basis.

The right to enjoy the use of all appropriate facilities thus appears to be amply covered, without any further modification.

c. In analyzing the question here presented, it is necessary to distinguish between the ship operator, on the one hand, and the ship builder on the other. The ship operator engages in an establishment activity reserved from the treaty (Article VII(2), first

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sentence). Thus each party, so long as it does not violate some other provision of the treaty, retains full freedom to subsidize its own citizen-owned, national shipping, without being obliged to extend such subsidies to shipping owned by nationals of the other party.

The "citizens" referred to in 46 USC 1151 are ship operators. The construction subsidy is granted upon application of the ship operator, and on his behalf. The law does not specify that the ship builder, who is ultimately awarded the construction contract, be a citizen. The law speaks only of a "shipyard within the continental limits of the United States" (Sec. 1155) without reference to the nationalities of the owners of the shipyard. By contrast, the citizenship of the ship operator is repeatedly mentioned; and the avowed objective of the act (Sec. 1101) is to foster a citizen-owned merchant marine (not citizen-owned shipyard). As to the precise question of how this law is "interpreted", the Department is unaware that there has been occasion to interpret it on this specific point, or that any problem has ever arisen over it. The Department does not have the function of interpreting such laws; it can only point out that the law, contrary to the Japanese reading of it, does not provide that shipbuilding subsidies be restricted to American citizens.

The Department understands that the Embassy would like also two other points to be clarified, as follows:

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Tokyo,
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1. As to the right of non-resident recipients of benefits under Article IV to convert yen payments into dollars. This Article provides national treatment. This means that insofar as this Article is concerned, the American non-resident beneficiary has a treaty right to exchange convertibility only to the extent that a Japanese non-resident would enjoy this privilege under Japanese law and regulation.

Further than this, however, it may be noted that the non-resident American would have such rights as are provided in Article XII; that is, no restrictions on convertibility except as may be allowed by the second paragraph of that Article, and, in situations where restrictions are necessary and allowable, he would enjoy such advantages as may be afforded by the phrase "giving consideration to special needs for other transactions" in paragraph 3 and by the "no arbitrary discrimination" precept of paragraph 4.

2. As to the precise meaning of the terms "trade names" and "trade labels" in Article X — the Department would have only the following observation to add to the Embassy's previous report of its explanation: These terms are merely by way of illustrating, along with "patents" and "trade-marks", the more common types of industrial property. The phrase "industrial property of every kind" is all-inclusive. It is thus unnecessary to have, in connection with the treaty, highly refined and precise definitions of the concepts "marks", "names" and "labels". It

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12-27-50

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Department of State

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Tokyo,
A-49, July 23, 1952

would indeed be quite permissible for Japanese and American law to differ substantially from each other in this and other industrial property matters. The Article's purpose is to provide national treatment with respect to whatever the laws of the country happen to provide with respect to recognizing and protecting industrial property; and the Japanese may make a free translation of secondary technical terms if transliteration proves to be difficult.

ACHESON

APPENDIX 2

Department of State

R 130506Z AUG 75
FM AMEMBASSY TOKYO
TO SELSTATE WASHDC 2418

UNCLAS TOKYO 11177

FOR L/SCA

E.O. 11652:N/A
TAGS: CGEN, CVIS, JA
SUBJECT: GOJ INTERPRETATION OF FCN TREATY

REF: TOKYO 3989, 28 MAR 75

1. AS INDICATED IN REFTEL GOJ FINALLY AUTHORIZED COMMERCIAL VISAS IN TWO CASES IN QUESTION ON STRICTLY AD HOC BASIS CONTENDING AMERICANS INVOLVED HERE WERE NOT ENTITLED TO TREATY BENEFITS. MFA STATES THAT ITS LEGAL ADVISERS HAVE NOT COMPLETED STUDY BUT ARE PRESENTLY OF VIEW THAT UNDER THE WORDING OF THE SECOND SENTENCE OF PARAGRAPH THREE OF ARTICLE XXII OF THE TREATY A COMPANY INCORPORATED IN JAPAN, OR AN INDIVIDUAL DOING BUSINESS AS SINGLE PROPRIETOR, EVEN THOUGH WHOLLY AMERICAN OWNED, IS NEVERTHELESS A JAPANESE COMPANY AND EXCLUDED FROM TREATY BENEFITS. THE SENTENCE IN QUESTION READS: QUOTE COMPANIES CONSTITUTED UNDER THE APPLICABLE LAWS AND REGULATIONS WITHIN THE TERRITORIES OF EITHER PARTY SHALL BE DEEMED COMPANIES THEREOF AND SHALL HAVE THEIR JURIDICAL STATUS RECOGNIZED WITHIN THE TERRITORIES OF THE OTHER PARTY. UNQUOTE.

2. EMB HAS ARGUED THAT GOJ INTERPRETATION CONFLICTS WITH THE GENERAL AIM OF THE

Department of State

TREATY WHICH IS TO PROMOTE TRADE AND INVESTMENTS BETWEEN OUR COUNTRIES. EMB HAS FURNISHED COMPLETE INFO TO MFA AS TO VIEW OF U.S. THAT NATIONALITY OF A MAJORITY OF THE STOCKHOLDERS CONSTITUTES THE NATIONALITY OF THE COMPANY. IT HAS ALSO POINTED OUT THAT NATIONALS OF A THIRD COUNTRY COULD NOT OBTAIN TREATY BENEFITS SIMPLY BY INCORPORATING IN JAPAN.

3. ACTION REQUESTED: IN ORDER THAT EMB MAY PURSUE THIS QUESTION FURTHER IN AN EFFORT TO OBTAIN MORE RECIPROCAL TREATMENT FOR AMERICANS DOING BUSINESS IN JAPAN, WITHOUT RELYING ON AD HOC DECISIONS, WHICH ARE TIME CONSUMING AND DIFFICULT TO OBTAIN, IT WILL BE APPRECIATED IF DEPT WILL FURNISH INFO AS TO WHETHER ANY OTHER COUNTRIES WITH WHOM WE HAVE FCN TREATIES ADHERE TO INTERPRETATION GIVEN BY JAPANESE. VIEWS OF MAJOR TRADING COUNTRIES SUCH AS FRANCE, GERMANY, ITALY, UNITED KINGDOM, NORWAY AND DENMARK WOULD BE MORE PERSUASIVE THAN SMALLER COUNTRIES. ANY OTHER IDEAS DEPT MIGHT HAVE ON THIS SUBJECT WOULD ALSO BE WELCOME. SHOESMITH.

UNCLASSIFIED

APPENDIX 3

Department of State

TO: AmEmbassy TOKYO

E.O. 11652: N/A
TAGS: CGEN, CVIS, EINV, JA

FROM: Department of State DATE: 1976 JAN-9 AM 9:45

SUBJECT: GOJ Interpretation of FCN Treaty

REF: Tokyo 11177

Department Legal Adviser's office has examined meaning of paragraph 3 of Article XXII of the U.S.-Japanese FCN Treaty signed at Tokyo April 2, 1953, and fully concurs with Embassy's general position as set forth reftel.

Most persuasive arguments we have found are (a) law review article on FCNs by Herman Walker, Jr., who formulated modern (i.e., post-WW II) form of FCN treaty and negotiated many FCNs; and (b) negotiating record of U.S.-Japan FCN, especially Dispatch No. 13 from Tokyo of April 8, 1952. Both documents are enclosed. Walker cites (pp 380-81), para 3 of Japanese FCN as standard definition of company for purposes of treaty, i.e., in the standard FCN treaty "A 'company' is defined simply and broadly to mean any corporation, partnership, company or other association which has been duly formed under the laws of one of the contracting parties; that is, any 'artificial' person acknowledged by its creator, as distinguished from a natural person, whether or not for pecuniary profit." This formulation is intended to avoid such complex questions as the law to be applied in determining company status. Every association meeting test of valid existence must have its "company" status duly recognized and is then eligible for substantive rights granted to companies under the treaty.

Department of State

In Dispatch 13 (p. 5), Jules Bassin, Legal Attache to Embassy, stated to Mr. Mikizo Nagai, Chief, Sixth Section, Economic Affairs Bureau, that "the recognition mentioned in the second sentence of paragraph 3 . . . meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party."

Thus, all that para 3 is meant to accomplish is the establishment of a procedural test for the determination of the status of an association, i.e., whether or not to recognize it as a "company" for purposes of the treaty. Once such recognition is granted, the functional rights accorded to companies under the FCN (for example, the Article VII rights of a company to establish and control subsidiaries) then accrue.

For reasons stated above, argument in para 2 of reftel that nationality of a company is determined by nationality of shareholders is not correct. Rather, a company has nationality of place where it is established (see pp. 382-83 of Walker). However, this does not mean that GOJ is free to deny treaty rights to U.S. subsidiary set up in Japan. While the company's status and nationality are determined by place of establishment, this recognition does not itself create substantive rights, which are dealt with elsewhere in the treaty. Thus, under Article VII of the Treaty, a national or company of either party is granted national treatment to control and manage enterprises they have established or acquired. Therefore, an American Company (i.e., one organized under U.S. law), may manage its Japanese subsidiary (i.e., a company set up under Japanese law). So too, under Article I, a U.S. national may enter Japan to direct his investment, even though the investment is a Japanese company. In sum, the substantive rights of U.S. nationals and companies vis-a-vis their Japanese investments accrue to them because the

treaty gives specific rights to U.S. nationals and companies as regards their investments, and it is irrelevant that, for the technical reasons noted above, the status and nationality of the investment are determined by the place of its establishment.

KISSINGER

Enclosures:

Herman Walker Law Review Article on FCNs
Dispatch No. 13 from Tokyo Apr. 8, 1952

APPENDIX 4

Department of State

Foreign Service Despatch

From:	HICOG BONN	2529
To:	The Department of State, Washington	March 18, 1954
Ref:	OURDES nos. 1355, October 28, 1953; 1372, October 30, 1953; and 2501 March 16, 1954	
Subject:	New Treaty of Friendship, Commerce, and Navigation: Report on March 16, 1954 Meeting with German Negotiators	

The 32nd regular business meeting for negotiation on the subject matter was held at the Foreign Office on March 16, 1954. Dr. Becker, as usual, served as chairman of the German team which included representatives of the Foreign Office and the Ministries of Economics, Justice, Labor and Interior. The U.S. side included Messrs. Boehringer, Levy, and Walker.

The meeting on March 16, was devoted to a detailed discussion of U.S. Article VIII on employment, professions, and non-profit activities, and U.S. Article IX on property rights.

Article VIII, Paragraph 1

The Germans stated that their preference remained to delete this paragraph, as being unnecessary, but that they were prepared to accommodate U.S. wishes for its retention in the treaty. They felt it to be in general acceptable as drafted, subject perhaps to linguistic clarifications and verification of their understanding of its intent. They had some questions to ask, in response to which the U.S. side developed answers as follows during the course of the discussion:

(1) The first sentence is of a general nature, being an elaboration of the principles of control and management set forth in Article VII, and is corollary thereto by emphasizing the freedom of management to make its own choices about personnel. Its major special purpose is to preclude the imposition of "percentile" legislation. It gives freedom of choice as among persons lawfully present in the country and occupationally qualified under the local law. The Germans said they might wish to suggest some linguistic revisions to clarify this last point. The

U.S. side said they did not feel that further clarification was essential, especially as the juxtaposition of the contrasting wording of the first and second sentences gives clear clarification by implication; but declared their willingness to consider any reasonable proposal, in deference to German views. No express clarification had been necessary in any other treaty, to the best recollection of the U.S. side.

R. N. Levy
Reporter

(2) The second sentence deals with a special and limited situation, and within its framework goes beyond the first sentence, inasmuch as it waives professional qualification requirements in the cases stipulated. These have to do with temporary jobs requiring special skills (e.g., for an American firm, competence in American law and accounting methods) for internal management purposes; and no right is created to engage in the general practice of a profession in the host country. In reference to the question of entry into the country, necessary entry privileges are implied. With specific reference to the needs of a German firm in the United States, procedures are understood to be available whereunder temporary visas can be issued in properly justified cases.

(3) The word "moreover" introducing the second sentence is merely a convenient connective, and has no special substantive significance. The Germans said that it did not carry over very well into German; and it was agreed that it be translated as *jedoch* in the German text.

(4) It was agreed to frame the first sentence in a manner similar to that agreed on for Article VII, paragraph 1, to wit:

> "Nationals and companies of Germany shall be permitted to engage within the territories of the United States of

America, and reciprocally nationals and companies of the United States of America shall be permitted to engage within the territories of Germany, accountants ..... et cetera."

Article VIII, Paragraph 2

It was agreed, as in the case of the preceding paragraph, to reframe the first sentence along the following lines:

"2. Nationals and companies of Germany shall be accorded wihin the territories of the United States of America, and reciprocally nationals and companies of the United States of America shall be accorded within the territories of Germany, national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities, and shall be accorded the right to form associations for that purpose under the laws of the country...."

Article IX

Dr. von SPRECKELSEN from the Justice Ministry, who acted as principal technical spokesman for the German side, commented that some legal difficulties had arisen which had not been considered during the earlier discussion of U.S. Article IX in October, 1953 (see reference despatches) which required additional explanation. He noted that these difficulties pertained to existing German legislation with respect to the acquisition of real property by alien natural persons and by alien juridical persons "residing abroad".

Acquisition of Realty in Germany by Alien Natural Persons

The German side noted that limited restrictions only were applicable regarding the acquisition of real property by alien natural persons and that these curtailments were based not on Federal but on old *Laender* legislation applicable in Hamburg, Hesse, and the part of the Rhineland-Palatinate which formerly belonged to Eesse.

They explained that in the above-cited *Laender* the acquisition of real property by alien natural persons depended on authorization granted by the *Land* authorities and that the purchase contract could not be fulfilled until the required authorization had been obtained. They noted that the date of the purchase contract became valid for the acquisition once the authorization had been accorded, but that the purchase contract was voided if the required authorization were denied. They added that the acquisition of real property by alien natural persons was subjected to such an authorization not only in cases of acquisition by contract but also in instances of acquisition by intestate or testate succession. They stressed that the existing provisions were being liberally applied, and that reciprocity treaties had been in the past concluded by Germany with other countries which waived the authorization requirement if likewise the countries concerned did not impose restrictions for the acquisition of real property by German nationals.

Acquisition of Realty by Alien Juridical Persons Residing Abroad

Dr. von Spreckelsen observed that for the acquisition of real property by alien juridical persons residing abroad practically all *Laender* required the granting of an authorization before a purchase contract became valid. He stated that the *Laender* applied the provisions on a liberal basis, and that old German treaties had renounced the application in case other countries had been prepared to grant reciprocity to German juridical entities.

He concluded that in view of these existing requirements it was difficult for the German side to accept paragraph 2 of U.S. Article IX, and asked whether the United States had ever granted natural and juridical alien persons in the United States national treatment as a treaty right.

Department of State

The U.S. side reviewed U.S. treaty policy on this point and noted that only the 1853 treaty with Argentina provided for national treatment with respect to acquisition of title to real property, and then only in the case of natural persons. They added that the treaty with France originally negotiated about 100 years ago had contained a similar provision but had been rejected by the Senate as constituting undue interference in State rights; and that the policy of the Federal Government for years had been to abstain from interfering with State regulation of land ownership. They stated that the present text of paragraph 1, U.S. Article IX, which granted national treatment with respect to the leasing of land needed for treaty purposes without according a similar right for the holding of land by title, represented an internal U.S. compromise on the question of how far alien land tenure should be the subject of treaty commitments.

They stressed that the present text granted the greatest advantages for practical treaty purposes and added, with respect to clause 1(b), that many States did not have discriminatory provisions in their legislation. In this connection, they noted that half the States had no disability laws, and perhaps 15-18 other States had variously slight or partial disability provisions, such as South Carolina and Pennsylvania which applied acreage limitations of a rather mild sort; Nebraska, which permitted full ownership inside municipalities but not in rural areas; and Wisconsin which prevented large scale holding of farmland by aliens by imposing acreage limitations in rural areas. They added that only seven or eight States had severe disability laws as to alien tenure. They concluded that, accordingly, an alien would for the most part be accorded either national treatment or very liberal treatment in the United States with respect to matters of treaty concern, and that the U.S. proposed language granted *de facto*

reciprocity since any German *Land* could withhold rights to a U.S. natural or juridical person seated or domiciled in a State which imposed restrictions on Germans.

The U.S. side noted that the issue of property rights by treaty was sensitive in the United States; and also that the proposed text placed the responsibility for any right withheld from a U.S. national abroad on the States which maintained disability provisions in their law, and gave the legislatures concerned a practical occasion for reviewing the need for maintaining disabilities which had been first adopted long ago when conditions were different.

As to the enforcement of alien disabilities in the States, they said that no known permit system had been established and that the disability clauses were typically latent legal provisions that allowed the alien to take title good as against all the world except the State itself. As a consequence, they stated, an alien could buy land, use it, and in the typical jurisdiction have this right challenged only by public authority through the writ of office found. They explained that this ancient writ was often subject to limitations; in Minnesota, for instance, if the Attorney General of the State did not challenge the alien's right within a specified number of years, the title became immune to challenge. They concluded that, although paragraph 1 contained a reservation, its effects were normally of small consequence since there existed a large degree of alien ownership either by virtue of liberal laws or practical toleration.

The Germans countered that insofar as Germany was concerned sentence 2, paragraph 2 conveyed an apparent but not a real reciprocity since they had no federal law which afforded a possibility to prohibit U.S. nationals to own land. They added that the lack of comprehensive laws to apply the treaty provisions for natural persons as distinct from juridical persons, for

whom restrictions existed in practically all *Laender*, would make paragraph 2 meaningless. Referring to paragraph 4, U.S. Article IX, they observed that under the German license system the authorization, once granted, could not be revoked and that these considerations made it difficult for them to accept the U.S. formulation in paragraph 2.

The U.S. side answered that paragraph 4, U.S. Article IX, was a practical commitment to safeguard the alien against enforcement of the old common law theory under which he had no heritable blood, and its European counterpart the *droit d'aubaine*. They added that the five year period allowed the alien to sell his property at a full market price and thus protected him against spoliation or sacrifice sales. Regarding sentence 2 of paragraph 2, they stressed that it contained a latent reservation only, and that there was no problem in Germany since the treaty did not wish a country to worsen its laws but sought only to establish minimum rights. They explained that in accordance with its provision a *Land* could deny an authorization if similarly a State had a disability law and that on the other hand, a *Land* would grant the authorization automatically in case no State disability law existed. If a *Land*, however, did not in absence of the treaty impose an alien disability, the treaty most certainly would not in any way oblige it to change its system.

The German side countered that Article IX was the only Article in the present treaty with a marked and unbalanced reciprocity provision; and they suggested that paragraph 1 be redrafted in a mutual manner to parallel the other treaty provisions, and that paragraph 2 be deleted.

This German suggestion was followed by a further discussion of the merits of the U.S. proposal, which was answered by a German assertion that they feared that the U.S. draft might

provoke political difficulties for the treaty. Its conspicuous difference from the way the treaty generally was set up would necessitate justifications in detail before parliament at the time of ratification; and they were not confident that they could give explanations that would readily allay suspicions in the Bundestag and Bundesrat. They feared that maintenance of the U.S. proposed text might, therefore, prejudice early and harmonious ratification.

At this point, Dr. Pecker being temporarily called from the room, the discussion disgressed to the following three questions asked by Dr. von Spreckelsen:

(1) With respect to clause 1(b) whether the words "other rights" included mortgages, or what, stressing that in Germany restrictions were applicable for only acquisition of real property.

The U.S. side replied that a sure treaty right being only accorded under clause (a), the words "other rights" had been used on purpose to cover everything not in (a) falling within the scope of the concept "tenure of property".

(2) The second German question was whether it would be possible to stipulate sure treaty rights in those States whose laws made specific exception for treaty rights, specific mention being made of Missouri. In reply to that question, the U.S. side stated that, aside from the fact that the Missouri law, at one time at least, apparently pertained only to treaties existing at the time the law had been enacted, they felt the treaty had to be geared to the situation existing in the "hard core" group of States.

(3) The third German question pertained to the phrase "acquiring through judicial process" in paragraph 4. They asked whether this phrase was designed to cover a change of ownership as a result of sale of property under execution in case a mortgage on such property had not been repaid. They further went on to

say that in Germany alien and German alike would not become the owner of a property by mere purchase contract, but only after finalization by a contract of transfer (*Auflassung*). If a purchase contract was not fulfilled, suit could be brought against the seller. They asked whether such a law suit was also meant to be covered by the words "judicial process".

The U.S. side replied that if the reason for failure to fulfill the purchase contract was not due to interference by public authorities but solely based on willful and personal action of the seller, they did not see offhand the relevance of the latter question, though they would not hazard any final opinion. They suggested that Dr. von Spreckelsen was better qualified to analyze such a question; and they noted that their own legal counsel was unfortunately unable to attend today's session. They stated that though primarily the words "judicial process" had been motivated by a desire to cover mortgage foreclosures, wording had been chosen broad enough to cover other cases wherein a legal interest in property might be established by judgment of a court; for example, attachment in satisfaction of a debt other than a mortgage; enforcement of a dower right; or the property settlement growing out of a dissolution of marriage in a community property State. Dr. von Spreckelsen said that he would probably offer some language designed to clarify the term "judicial process", which was not a term that would be easily understood in Germany.

Department of State

Conclusion

Dr. Becker reverted to his proposal that paragraph 1 be mutualized, and paragraph 2 deleted. He stated that he wanted to stress that notwithstanding the resultant narrowing of the scope of the treaty provision, U.S. citizens and companies could rest assured of being accorded liberal treatment in Germany, in keeping with the basic purposes of the treaty to promote friendly intercourse and encourage broader business relations. He did not foresee that Americans would experience any difficulties in getting the property they might need in future.

It was finally agreed that the U.S. side would submit a redraft in compliance with Dr. Becker's proposal, and recommend it to the Department. The U.S. side stated, however, that they would be most happy to revert to the original U.S. proposal, if later after further consideration the Germans concluded that it would be feasible from the parliamentary viewpoints.

The redraft in question was prepared and handed to the Germans on March 17, copy enclosed.

Carl H. Boehringer
Commercial Attache
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Enclosure:

Suggested Redraft,
Article IX, paragraph 1

Coordination:

Mr. Herman Walker, Jr.

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Nos. 80-2070 and 81-24

In the Supreme Court of the United States

OCTOBER TERM, 1981

SUMITOMO SHOJI AMERICA, INC., PETITIONER

v.

LISA M. AVIGLIANO, ET AL.

LISA M. AVIGLIANO, PETITIONER

v.

SUMITOMO SHOJI AMERICA, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether respondents' complaint states a claim for relief under Title VII of the Civil Rights Act of 1964.

2. Whether a Japanese-owned company incorporated in the United States is a company of Japan for purposes of the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan and therefore may invoke on its own behalf the privilege conferred by Article VIII of the Treaty on nationals and companies of Japan to engage certain personnel "of their choice" within the territories of the United States.

3. Whether, if the Court concludes that a Japanese-owned company incorporated in the United States is a company of Japan for purposes of the Treaty, including the Article VIII(1) privilege, the Court should decide in the absence of a factual record the manner in which the Article VIII(1) privilege is affected by Title VII of the Civil Rights Act of 1964.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

SUMMARY OF ARGUMENT

1. Sumitomo errs in contending that the complaint should be dismissed because it challenges employment practices based on citizenship. The complaint explicitly

alleges discrimination on the basis of sex and national origin. In any event, this Court made clear in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), that Title VII prohibits discrimination on the basis of citizenship when it has the purpose or effect of discriminating on the basis of national origin.

2. Article VIII(1) of the Treaty with Japan confers on "[n]ationals and companies of either Party" a right to engage specified personnel of their choice "within the territories of the other Party." Thus, Sumitomo can invoke the Article VIII(1) employment privilege in the United States only if it is a company of Japan for Treaty purposes. The pertinent definitional provision of the Treaty, Article XXII(3), expressly provides, however, that "[c]ompanies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof." This provision makes clear that a company has the nationality of its place of incorporation. Because Sumitomo is incorporated in the United States, it is a company of the United States, and it therefore cannot invoke the Article VIII(1) employment privilege.

The conclusion that the Parties did not intend for enterprises incorporated in the United States but controlled by a Japanese company to invoke the Article VIII(1) employment privilege is reinforced by the fact that elsewhere in the Treaty the Parties expressly conferred rights on such controlled enterprises. Among the rights conferred on foreign controlled companies is the central protection of the Treaty in Article VII guaranteeing treatment no less favorable than that offered a domestically controlled enterprise. The negotiating history and subsequent interpretation of the Treaty also reflect the understanding of the contracting Parties that a company would have the nationality of the place of its incorporation, and the United States and the Ministry of Foreign Affairs of the Government of Japan both take that view at the present time specifically with regard to Article VIII(1).

3. If the Court nevertheless concludes that Sumitomo is a company of Japan for purposes of the Article VIII(1) employment privilege, it should not reach the issue of the relationship of that Article to Title VII of the Civil Rights Act. The court of appeals' attempted reconciliation of Article VIII(1) and Title VII through a relaxed "bona fide occupational qualification" ("BFOQ") exception in Title VII is analytically flawed; the appropriate defense to a citizenship requirement that has the *effect* of discriminating on the basis of national origin is that of "business necessity," not the BFOQ exception. Moreover, because the decisions below were rendered in connection with Sumitomo's motion to dismiss the complaint, there has not yet been an opportunity for the parties to develop or for the court to make factual findings on a number of significant matters that should inform the Court's resolution of the manner in which Title VII may affect a company's exercise of the Article VIII(1) privilege.

ARGUMENT

INTRODUCTION: TREATY TRADER VISAS

Article VIII(1) of the Treaty of Friendship, Commerce and Navigation (FCN) between the United States and Japan, Apr. 2, 1953, 4 U.S.T. 2070 confers on nationals and companies of Japan doing business in the United States a right to engage certain personnel of their choice. But where the persons of choice are Japanese nationals not resident in the United States, they cannot be employed in the United States unless they first are admitted pursuant to the "treaty trader" section of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(15)(E)(i). That Section provides that an alien is entitled to enter the United States in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national." This statutory section implements

provisions in FCN Treaties such as that in Article I of the Treaty with Japan, which states that "[n]ationals of either Party shall be permitted to enter the territories of the other Party and to remain therein * * * for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities." [1]

The treaty trader provisions of this Article and the INA apply to an eligible alien whether or not his prospective employer in the United States is a national or company of Japan for purposes of the Article VIII(1) employment privilege. However, in issuing visas under 8 U.S.C. 1101(a)(15)(E), the State Department has required as an administrative matter that where the alien seeking a treaty trader visa will be employed by a trading firm, the majority ownership of the firm must be in persons having the nationality of the visa applicant. 22 C.F.R. 41.40(a)(2); 9 Foreign Affairs Manual (FAM), Pt. II, § 41.40 Note 16 (Feb. 20, 1975).

State Department regulations further require that the applicant for a treaty trader visa "will be engaged in duties of a supervisory or executive character, or, if he is or will be employed in a minor capacity, he has the specific qualifications that will make his services essential to the efficient operation of the employer's enterprise and will not be employed solely in an unskilled manual capacity." 22 C.F.R. 41.40(a)(2); 9 FAM, Pt. II, § 41.40 Notes 10 and 13, § 41.41 Note 4. State Department instructions sent to consular posts on July 10, 1981, elaborate upon these requirements, based upon precedential materials in the State Department's files. App. A, *infra*.

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[1] Article I(b) further provides that nationals of one Party may enter the territories of the other "for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital." Aliens seeking to enter the United States for this purpose must qualify as a "treaty investor" under the 8 U.S.C. 1101(a)(15)(E)(ii). See also 8 U.S.C. 1101(a)(15)(L) (intra-company transfers).

The recent instructions stress that a position will be regarded as "executive" or "supervisory" for treaty trader purposes only if it is a top-level management position. Among the relevant factors are "the degree to which the applicant will have ultimate control and responsibility for the firm's overall operations or a major component thereof [and] the number and skill levels of the employees within his responsibility" (App. A, *infra*, 3a, ¶ 4).[2] The instructions explain that Congress did not intend for "minor managerial positions to be filled by alien workers when the position could be held by an American employee 'without placing in jeopardy the U.S. investment made by a foreign firm'" (*id.* at 5a, ¶ 7, quoting *Matter of Udawaga*, 14 I. & N. Dec. 578, 581 (1974)). In addition, it is necessary that the position the alien would occupy "principally requires management skills, or entails supervision over and key responsibility for a large portion of a firm's operation, and only incidentally involves substantive, day-to-day staff work related to the firm's type of business" (App. A, *infra*, 4a, ¶ 5).

An alien may obtain a treaty trader visa to occupy a position that is *not* executive or supervisory in nature only if he is a specialist who is "truly essential to the firm's operations in the U.S."; treaty trader status is not intended "as a channel for the importation of ordinary skilled workers" (App. A, *infra*, 6a, ¶ 8). The appropriate question for these positions, therefore, is "what is it that the foreign worker can do under the circumstances that an American worker cannot do or cannot be trained to do?" (*ibid.*). Moreover, it is expected that treaty trader aliens who do not occupy executive or supervisory positions will train Americans to assume their duties. *Id.* at 7a, ¶ 9; cf. 9 FAM, Pt. II, § 41.40 Note 10.2.

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[2] See also *id.* at 5a, ¶ 6 ("an applicant coming to head one of [the] operation's bureaus or departments (*e.g.*, accounting, loans, etc.) could probably be deemed destined to an executive or supervisory position and therefore entitled to E-1 issuance").

In sum, although the United States and Japan have interpreted the Treaty to preclude a Japanese-owned company incorporated in the United States from invoking the special employment privilege in Article VIII(1), the treaty trader section of INA has been applied administratively to employment with a broader range of firms—all those in which the majority ownership interest is held by persons having the nationality of the visa applicant, irrespective of the place of incorporation. Accordingly, as a wholly Japanese-owned trading company, Sumitomo may continue to obtain the services of Japanese nationals, to the extent they qualify for treaty trader visas under the standards described above, even if the Court concludes that Sumitomo is not a company of Japan that may invoke the special employment privilege in Article VIII(1) of the Treaty.

I. THE COMPLAINT SHOULD NOT BE DISMISSED FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

Sumitomo first argues (Br. 14-18) that respondents' challenge to the exercise of its purported right under Article VIII(1) of the Treaty to employ Japanese citizens fails because, under this Court's decision in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), discrimination on the basis of citizenship is not prohibited by Title VII. This contention fails to take account of the wording of the complaint and the actual holding in *Espinoza*.[3]

The first paragraph of the complaint explicitly states that this case "involves * * * national origin discrimination in employment." J.A. 6a. Count 2 of the complaint does refer to discrimination based on "nationality," but this does not necessarily mean citizenship. In *Griggs* v.

[3] This argument also is inconsistent with Sumitomo's answer of "no" to an interrogatory asking whether it has, since 1969, "utilized an employee's country of national origin, for example, *Japanese citizenship*, as a criterion for eligibility to hold certain jobs with the Corporation" (J.A. 44a) (emphasis added).

Duke Power Co., 401 U.S. 424, 436 (1971), for example, this Court used the term nationality as a synonym for national origin. Nor does the complaint refer to the Treaty, upon which Sumitomo relies in arguing that respondents actually challenge a citizenship requirement. Sumitomo first cited the Treaty in its answer, relying upon it as an *affirmative defense* to the allegations of discrimination. J.A. 82a.

In any event, Sumitomo errs in arguing that this Court's decision in *Espinoza* insulates all citizenship requirements from scrutiny under Title VII. Although the Court held in *Espinoza* that the term "national origin" in Title VII does not embrace citizenship requirements as such, it stressed that "certainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin" (414 U.S. at 92). Respondents should be given the opportunity to prove that Sumitomo's asserted citizenship requirement has such a purpose or effect. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957).[4]

Independent of their claim of national origin discrimination, respondents also allege that Sumitomo "[d]iscriminat[es] against women by restricting them to clerical jobs" and "by refusing to train them or promote

[4] Among other things, respondents might be able to show that Sumitomo waives its citizenship requirement for American citizens of Japanese national origin and that the citizenship requirement therefore is being used as a pretext for national origin discrimination. *Espinoza*, *supra*, 414 U.S. at 92. Even without such evidence, respondents might be able to show that a Japanese citizenship requirement has the effect of selecting employees on the basis of national origin. Such a requirement would then violate Title VII unless Sumitomo could show as a factual matter that it is job-related (*id.* at 92-93; *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)) or unless Article VIII(1) of the Treaty is construed to constitute a legislative-type validation of the job-relatedness of the citizenship requirement for the particular positions involved. See page 26, *infra*. In addition, although respondents did not so allege in their complaint, because the population of Japan is racially homogeneous, it may be that a Japanese citizenship requirement would have the purpose or effect of discriminating on the basis of race by favoring orientals over others.

them to executive, managerial, and/or sales positions" (J.A. 9a). Sumitomo seems to assume that this claim must be limited to an assertion that Sumitomo prefers male citizens of Japan over female citizens of Japan, because it argues that while Reiko Turner, who is a Japanese citizen, states a claim of sex discrimination, the remaining respondents, who are American citizens, do not. This assumption is incorrect. The allegation that Sumitomo "discriminat[es] against women" (J.A. 9a) is certainly broad enough to encompass a claim that Sumitomo prefers all men, both Japanese and American, over all women. Indeed, Sumitomo's reports submitted to the EEOC for the years 1975 and 1976 indicate that it has hired some white males—presumably Americans—in the categories of "Officials and managers," "Professionals," and "Sales workers," but has hired no females in those categories. J.A. 61a, 67a. Consequently, all respondents have stated a claim of sex discrimination, not just respondent Turner.

II. SUMITOMO IS NOT A COMPANY OF JAPAN FOR PURPOSES OF THE TREATY, INCLUDING THE SPECIAL EMPLOYMENT PRIVILEGE IN ARTICLE VIII

Sumitomo claims unfettered discretion under Article VIII(1) of the Treaty to hire Japanese nationals to the exclusion of United States nationals for any or all the positions at issue here. A necessary premise of that claim is that Sumitomo is a "company of Japan" for purposes of the Treaty—since Article VIII(1) of the Treaty confers only on "[n]ationals and companies of either Party" the right to engage, "within the territories of the other Party," the specified personnel of their choice. The text and background of the Treaty make clear, however, that the nationality of a company is determined by the place of its incorporation. The Government of Japan consistently has taken this position, as reiterated most recently in an official communication by the Ministry of Foreign Affairs to the American

Embassy in Tokyo on February 26, 1982. App. B, *infra.* Sumitomo is a company of the United States under this test, and it therefore cannot avail itself of the employment privilege in Article VIII(1).

A. The Text of the Treaty

Article VIII(1) confers on "companies of either Party" the right to engage specified personnel of their choice "within the territories of the other Party." Article VIII does not, however, define the term "company." Nor does that Article establish a test for ascertaining the nationality of an enterprise for purposes of determining whether it is a company "of" one Party (in this case, Japan), such that it may invoke the right to engage employees of its choice within the territories of the "other Party" (here, the United States).

The definitional Article of the Treaty, Article XXII, performs both functions. Paragraph (3) of that Article, in its first sentence, defines "companies" to mean "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." The second sentence of Paragraph (3) in turn furnishes an explicit test for determining the nationality of such "companies" (emphasis added):

> *Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof* and shall have their juridical status recognized within the territories of the other Party.

Herman Walker—"the architect of the modern FCN treaty"[5] and adviser to the State Department on commercial treaties in the 1950s[6]—explained that under

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[5] *Spiess* v. *C. Itoh & Co. (America), Inc.*, 643 F.2d 353, 357 (5th Cir. 1981).

[6] Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229 (1956).

FCN treaty provisions such as Article XXII(3), "[a] 'company' is defined simply and broadly to mean * * * any 'artificial' person acknowledged by its creator, as distinguished from a natural person, * * *."[7] With obvious reference to the second sentence of Article XXII(3), Walker further explained that "[e]*very association meeting this simple test of valid existence must be accounted by the other party a company of the party of its creation,* and have its juridical status recognized without any reservation for the laws of the forum." Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int. L. 373, 380-381 (1956) (emphasis added; footnotes omitted).

Applying this explicit definition of nationality, it is clear that Sumitomo is, by virtue of its incorporation in New York, a company of the United States for purposes of the Treaty. The court of appeals therefore plainly erred in concluding that because Sumitomo is wholly owned by a Japanese company, "it is properly classified as a Japanese company for the purpose of invoking the substantive provisions of the Treaty, including Article VIII." Pet. App. 11a-12a. The simple place-of-incorporation standard in the FCN treaties was a deliberate departure from other tests of corporate nationality—including a control test of the sort adopted by the court of appeals—that were followed or suggested in other situations during the preceding several decades. Walker, *supra*, 50 Am. J. Int. L. at 381. Moreover, the intent of the Parties that a company's nationality would *not* be determined by the nationality of its owners is reinforced by other provisions of the Treaty that distinguish between nationals and companies of a Party and enterprises owned or controlled by such nationals and companies.

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[7] Walker, *Provisions on Companies in United States Commercial Treaties*, 50 Am. J. Int. L. 373, 380 (1956). Walker referred to Article XXII(3) of the Japanese Treaty as exemplifying the standard definition of the term "company" in FCN treaties. *Id.* at 380 n.34.

Article VII is particularly instructive in this regard. Paragraph (1) of that Article confers on nationals and companies of one Party the right to open branch offices within the territories of the other Party or, alternatively, "to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party." The quoted language plainly contemplates that when a national or company of one Party organizes a company under the laws of the other or acquires a controlling interest in such a company, the controlled entity nevertheless remains a company "of such other Party"—*i.e.*, the Party under whose laws it was organized. Similarly, Article XVI(2) provides that articles "produced by nationals and companies of either Party within the territories of the other Party, *or by companies of the latter Party controlled by such nationals and companies*," shall be accorded treatment no less favorable than like goods of national origin. The emphasized language makes clear that an entity remains a company of one Party even when controlled by a national or company of the other. Similarly, Articles VI(4) and VII(4) and the last sentence of Article VII(1), discussed below (see page 13 note 9, *supra*), expressly confer rights on enterprises controlled by nationals and companies, as distinguished from the nationals and companies themselves.[8]

These provisions demonstrate that where the Parties intended to confer rights on enterprises controlled by nationals and companies of a Party as well as upon the nations and companies themselves, the Treaty expressly

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[8] Moreover, as Herman Walker explained, the place-of-incorporation test of corporate nationality is consistent with the treatment of a vessel, whose nationality is that of the flag it flies, not its owners. Art. XIX(2); see Walker, *supra* note 7, 50 Am. J. Int. L. at 382. This rule is consistent as well with the practice of United States courts of regarding a corporation as a citizen of the place of its incorporation. *Id.* at 382; see 28 U.S.C. 1332(c); *Steamship Co.* v. *Tugman*, 106 U.S. 118 (1882); *Thomas* v. *Board of Trustees*, 195 U.S. 207 (1904).

so provides. The failure of the Treaty to mention controlled enterprises in the first sentence of Article VIII(1) therefore establishes that such enterprises are not included among the entities that can assert the special employment privilege in that Article. See *Spiess* v. *C. Itoh & Co. (America)*, *supra*, 643 F.2d at 366-367 (Reavley, J., dissenting); see, *e.g.*, *Lehman* v. *Nakshian*, No. 80-242 (June 26, 1981), slip op. 6. This conclusion is especially compelling in view of the very next sentence of the same paragraph of Article VIII, which clearly distinguishes between companies of one Party and their enterprises within the territories of the other Party (emphasis added):

> Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations *exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.*

The court of appeals nevertheless concluded that a company such as Sumitomo should be deemed a company of Japan because the court found it "unlikely" that the Parties intended to grant each other broad rights in Article VII to establish and maintain subsidiaries and yet "to bar those same subsidiaries from invoking almost all of the substantive provisions which the Treaty contains" (Pet. App. at 8a). See also *Spiess* v. *C. Itoh & Co.*, *(America)*, *supra*, 643 F.2d at 358. Sumitomo echoes the same argument. Br. 36-37. With all respect, the court of appeals and Sumitomo have simply misunderstood the structure of the Treaty.

Contrary to the court of appeals' apparent belief, a Japanese-controlled company incorporated in the United

States has substantial protection under the Treaty even if it is not deemed a company of Japan. Article VII—"the heart of the treaty" (J.A. 130a)—explicitly provides in the last sentence of Paragraph (1) that enterprises within the territories of one party that are controlled by nationals and companies of the other "shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party." This provision ensures "national treatment" for Japan-controlled companies incorporated in the United States—*i.e.*, it places them on an equal footing with American-controlled corporations in the United States.[9] Such an approach is entirely consistent with the principle that a corporation is an artificial person, wholly the creature of the laws that authorize its formation. Accordingly, when Japanese nationals or companies choose to incorporate an enterprise under

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[9] In addition, Article VII(4) grants enterprises controlled by nationals and companies of one Party, like the nationals and companies themselves, most-favored-nation status in matters treated in Article VII. This guarantee is of importance where the host Party grants rights to foreign individuals and companies that it does not grant to its own.

The Treaty also carefully distinguishes between nationals and companies of a Party and enterprises in which such nationals and companies have an interest for purposes of protections against the taking of property. Article VI(3) provides that property of nationals and companies of one Party within the territories of the other cannot be taken except for a public purpose and unless just compensation is promptly paid. Article VI(4), in contrast, affords the enterprises only national and most-favored-nation treatment in such matters, without, *e.g.*, an explicit guarantee to the *enterprise* of just compensation. Paragraph 2 of the Protocol accompanying the Treaty (4 U.S.T. 2082) does protect the interest of nationals and companies in their enterprises, however, by stating that the provision for payment of just compensation extends to interests held by them "directly or indirectly" in property taken within the territories of the other Party. Once again, however, this is a right of the *parent*, not of the controlled enterprise itself. Compare the second sentence of Article VIII(1) discussed at page 12, *supra*; compare also Art. V(1).

the laws of the United States, it is appropriate that the enterprise be subject to the laws of the United States pertaining to such corporations generally and that it not benefit from any special privileges not available to nationals and companies of the United States, such as whatever protection from the operation of domestic law is afforded by Article VIII(1). In return, the foreign owners receive the benefit of limited liability for the corporation's operations, a distinct corporate presence in this country, and possibly certain tax advantages as well. Moreover, the national treatment provided by the Treaty furnishes appropriate assurance against discriminatory measures directed at the foreign-owned company that could adversely affect the favorable investment climate the Treaty was intended to create.

The court of appeals sought to minimize the significance of Article VII(1) and other provisions of the Treaty that confer rights specifically on enterprises in which nationals and companies have an interest by arguing that these provisions were intended simply to furnish *additional* rights beyond those which they would have merely as companies of Japan. Pet. App. 9a. This suggested explanation, however, ignores the fact that the rights granted to such enterprises are either the same as those granted to companies of Japan (*e.g.*, Art. VII(4); compare the first and last sentences of Art. VII(1); cf. Art. XVI(2)) or actually afford *less* protection than is given to such companies (*e.g.*, Art. VI(4)). See generally *Spiess* v. *C. Itoh & Co. (America)*, *supra*, 643 F.2d at 367 (Reavley, J., dissenting). Thus, the Parties' fashioning of distinct rights for controlled enterprises indicate that the Parties intended the rights of such enterprises to be limited to those separately conferred.

The court of appeals reasoned (Pet. App. 8a), however, that the Parties could not have intended to deny to Japanese-owned U.S. corporations certain other rights that are expressly conferred on nationals and companies of Japan. But as we have just explained there are entirely logical reasons for attaching significance to the

place of the incorporation of an artificial person; and, in any event, the principal protections of the Treaty *are* afforded to enterprises such as Sumitomo pursuant to Article VII. Moreover, most of the privileges that are granted to nationals and companies of the foreign state also would, as a practical matter, be enjoyed by the controlled enterprise by virtue of its receiving treatment equal to that of a domestically controlled corporation. See generally *Spiess* v. *C. Itoh & Co. (America)*, *supra*, 643 F.2d at 367-369 (Reavley, J., dissenting). But to the extent that there *are* differences in treatment depending upon the place of incorporation, there is every reason to believe that the Parties intended precisely that result. The court of appeals should not have reformulated the terms of the Treaty protection because of its own dissatisfaction with the pattern of rights it understood to have been conferred.

Another difficulty with the court of appeals' approach is that it does not yield a bright-line test for determining a company's nationality. Indeed, the court of appeals itself recognized that its approach would require a "case-by-case analysis of the relevant facts" to determine whether a company incorporated in the United States is "sufficiently 'Japanese'" to invoke the various substantive provisions of the Treaty. Pet. App. 11a n.4. Such an approach substantially undermines what was intended to be the principal advantage of the place-of-incorporation test—its simplicity. See Walker, supra note 7, 50 Am. J. Int. L. at 382 (referring to the "*simple* 'classical' test"; emphasis added); J.A. 157a-158a.

B. The Negotiating History and Subsequent Interpretation of the Treaty

The limited negotiating history, to which recourse properly may be had in interpreting the Treaty, *Neilson* v. *Johnson*, 279 U.S. 47, 52 (1929), strongly reinforces the plain meaning of the text, discussed above. Most revealing is a State Department airgram sent to the

American Embassy during the course of the negotiations, which stated (J.A. 145a-146a):

> Article XXII, Paragraph 3, * * * establishes that whether or not a juridical entity is a "company" of either Party, for treaty purposes, is determined solely by the place of incorporation. Such factors as location of the principal place of business or the nationality of the majority of stockholders are disregarded.

Sumitomo, like the court of appeals (Pet. App. 11a), relies (Br. 38) on an excerpt from a memorandum of a conversation between American and Japanese negotiators regarding the second sentence of Article XXII(3). A Japanese representative inquired what the "recognition of juridical status mentioned in paragraph (3) meant" (J.A. 143a-144a). The American representative replied that this "meant merely the recognition by either Party of the existence and legal status of juridical persons organized under the laws of the other Party" (*id.* at 144a). Sumitomo apparently reads this brief exchange as an indication that the second sentence of Article XXII(3) was drafted for the sole purpose of ensuring the recognition of a company as a legal entity, without affecting the entity's substantive rights. Br. 37-38. This contention is simply wrong. The second sentence of Article XXII(3) has two distinct clauses: the first provides that companies constituted under the laws of one Party "shall be deemed companies thereof"; the second provides that such companies "shall have their juridical status recognized within the territories of the other Party." The exchange cited by Sumitomo obviously refers only to the recognition of juridical status addressed in the second clause. It does not even refer to the first clause of the sentence, which states the place-of-incorporation test of nationality for purposes of determining a company's substantive rights under the Treaty.

Sumitomo also cites (Br. 38) a passage in an article by Herman Walker that was relied upon by the court of appeals in this case (Pet. App. 11a) and by the

Fifth Circuit in the *Spiess* case (643 F.2d 353). Walker stated that there is a

> clear distinction maintained in the treaties between the so-called "civil" and "functional" capacities of companies. The recognition of status and nationality does not of itself create substantive rights; these are dealt with elsewhere on their own merits. Thus, the acknowledgement of a fact—the existence and legitimate paternity of an association—is not confused with problems associated with the functional rights and activities of alien-bred associations.

Walker, *supra* note 7, 50 Am. J. Int. L. at 383. This passage lends no support whatever to Sumitomo's assertion that Article XXII(3) is concerned only with ensuring the recognition of the legal status of a company. The passage refers to recognition of "status *and* nationality"—to the "existence *and* legitimate paternity" of an association (emphasis added). Thus, in this passage Walker plainly viewed Article XXII(3) as defining a company's nationality by the place of its organization. To be sure, as the Walker article and Sumitomo both note, the establishment of nationality does not in itself create substantive or functional rights. But this is hardly remarkable in a definitional paragraph. As the Walker article states, substantive rights are conferred on companies of either Party *elsewhere* in the Treaty, according to the nationality of the companies as defined in Article XXII(3).

Sumitomo also relies (Br. 20) on a 1976 airgram from the Department of State to the American Embassy in Tokyo. J.A. 157a-158a. For two reasons, however, this document, too, in fact undermines Sumitomo's argument. First, the airgram responded to a telegram from the American Embassy in Tokyo conveying the view of the Ministry of Foreign Affairs of the Japanese Government that a company incorporated in Japan, even though entirely American-owned, is a company of Japan for purposes of the Treaty. J.A. 155a. Second, the State Department's response *agreed* with the Japanese view that a

company has the nationality of the place where it is established. J.A. 158a-159a. The airgram then explained that substantive rights are conferred elsewhere in the Treaty according to the company's nationality. Thus, it pointed out that an American company would have a right under Article VII to manage its Japanese-incorporated subsidiary and that a U.S. national has a right under Article I to enter Japan to direct his investment even though that investment is in the form of a Japanese corporation. J.A. 159a. These descriptions of the Treaty rights of U.S. nationals and companies with respect to their investments in enterprises incorporated in Japan are plainly correct. The passage does not, however, even mention Article VIII(1) of the Treaty, much less suggest that the Japanese corporation, because it was American-owned, could have invoked the privilege afforded by Article VIII(1) to companies of the United States to engage personnel of their choice in Japan. Consequently, the airgram lends no support to Sumitomo's assertion of a reciprocal right in the United States.[10]

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[10] Sumitomo also relies (Br. 37-38) on a passage from a letter sent by Herman Walker to an official of the U.S. Embassy in the Netherlands in 1955 regarding the negotiation of the Treaty of Friendship, Commerce, and Navigation with the Netherlands, Mar. 27, 1956, 8 U.S.T. 2043. See J.A. 288a. The passage concerns a draft proviso prepared by the State Department for possible inclusion in the paragraph of the Dutch Treaty that corresponds to Article XXII(3) of the Japanese Treaty. Under the proviso, which was to be added at the request of the Dutch, controlled companies would have been afforded the same rights as their parents. J.A. 287a-288a. The Dutch apparently found the wording of the proviso unacceptable because they believed it left the impression that Dutch-controlled enterprises in the United States would be unable to claim *greater* protection than their parents where such protection was otherwise available. *Ibid.*

The Dutch eventually withdrew their insistence on a provision of this type, apparently accepting the legitimacy of the concerns of the United States that a general extension of all of the parent's rights to its controlled enterprises might have certain undesirable consequences. J.A. 303a, 305a. Further, they apparently assumed that, even without a provision in the Treaty, a Party, as a matter

It is true, as Sumitomo points out (Br. 38-39), that then-Deputy Legal Adviser Marks of the State Department expressed the view in a 1978 letter to the General Counsel of the EEOC that the Department saw no grounds for distinguishing, for purposes of invoking the Article VIII (1) employment privilege, between Japanese-owned companies incorporated in the United States and unincorporated branches of a Japanese company. J.A. 94a-96a. However, this letter set forth no legal analysis of the question. Moreover, the Department of State changed its view less than a year later, concluding after "an extensive review of the negotiating files on our [FCN treaties], including the 1953 FCN with Japan," that "it was not the intent of the negotiators to cover locally-incorporated subsidiaries [in Article VIII(1)], and that therefore U.S. subsidiaries of Japanese corporations cannot avail themselves of this provision of the treaty." J.A. 307a. This remains the position of the United States. The Ministry of Foreign Affairs (MFA) of the Government of Japan takes the same view with specific reference to this case. App. B, *infra*.[11] The views of the contracting

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of domestic law, would not give less favorable treatment to a controlled company than to the parent. *Ibid.*

Thus, the Parties in the Dutch negotiations recognized that the Dutch Treaty, like the Japanese Treaty, provided only certain rights to controlled enterprises and that an extension of greater rights to them would require an amendment. There was, moreover, no reference to the employment right in Article VIII(1) of the Dutch Treaty; the controversy centered instead on property rights covered by another Article. J.A. 280a. This exchange of letters, which occurred more than two years *after* the Japanese Treaty was ratified, therefore concerned a distinct subject matter, a different treaty, and a proposed provision thereof that was not adopted. To the extent it has any relevance here, it corroborates our position rather than Sumitomo's contention.

[11] As the last two documents lodged with the Clerk by respondents show, MFA had expressed the same view informally to the American Embassy in Tokyo in 1979 in connection with this case.

Sumitomo refers (Br. 20) to the brief amicus curiae filed by the Ministry of International Trade and Industry (MITI) of the Government of Japan in this case. The MITI brief does not specifically address the legal question whether Sumitomo is a company

parties on a question of treaty interpretation are entitled to great weight. *Kolovrat* v. *Oregon*, 366 U.S. 187, 194-195 (1961).

Finally, Sumitomo relies (Br. 39-40) on the State Department's administration of the treaty trader section of the INA, under which a Japanese alien may obtain a treaty trader visa to assume a covered position with a company incorporated in the United States if more than 50% of its stock is owned by Japanese nationals. Sumitomo argues that a similar 50% ownership rule should be adopted for purposes of the special employment privilege in Article VIII(1), without regard to the place of incorporation. This argument is misplaced. The regulations establishing the 50% ownership test were adopted by the State Department to implement a provision in an Act of Congress of general applicability that has the specific purpose of permitting the free movement of *individual aliens* to the extent necessary to facilitate trade with the Nation's treaty partners. That statutory provision, the State Department's regulations under it, and the treaty trader provisions of the numerous FCN treaties they implement (see 9 FAM, Pt. II, Exh. 1) do not confer rights on companies or even refer to the distinct employment privilege of companies under a number of the FCN treaties. Nor has Sumitomo cited any evidence that the Parties to the Treaty or the State Department ever considered that the treaty trader and employment privilege Articles of this and other FCN treaties were intended to have the same reach.

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of Japan for purposes of the Treaty. But because MITI's brief might be understood to support Sumitomo's position on this issue, and in order to assist the Court by resolving any resulting confusion regarding the position of the Government of Japan on this issue we requested the State Department to seek clarification from MFA. The February 26, 1982 statement of MFA, reiterating its previous view (App. B, *infra*), is the result of that inquiry. That statement takes the position that MFA is the Office of the Government of Japan responsible for interpretation of the Treaty. It also explains that MFA's position had been made known to MITI, which posed no objection, although the MFA position is not a joint statement of the two Ministries.

Article I of the FCN with Japan, for example, authorizes "[n]ationals of either Party * * * to enter the territories of the other Party and to remain therein * * * for the purpose of carrying on trade between the Parties and engaging in related commercial activities." In contrast to the employment privilege in Article VIII(1), the right of entry in Article I is not limited to persons who will be engaged by nationals or companies of the foreign state. The administrative requirement imposed by the Secretary of State that a company nevertheless must be more than 50% foreign owned in order for an alien of the same nationality to be eligible for a treaty trader visa is simply an appropriate measure to confine the treaty trader right within reasonable limits. It bars foreign nationals from entering this country to work for essentially American concerns without complying with the labor certification and similar requirements designed to protect American jobs. 8 U.S.C. 1101(a)(15)(H) and 1182(a)(14); *Saxbe* v. *Bustos*, 419 U.S. 65, 75-76 (1974). These administrative *limitations* on the scope of the treaty trader provisions of the INA therefore cannot be read implicitly to *broaden* the scope of the special employment privilege in Article VIII(1), which the Parties deliberately confined to employers who are nationals or companies of the foreign state.

The conclusion that a corporation such as Sumitomo cannot avail itself of the special employment privilege in Article VIII(1) does not mean, of course, that Japanese nationals cannot be employed in Sumitomo under any circumstances. Some Japanese nationals may be permitted to enter the United States under the treaty trader and investor provisions in Article I of the Treaty and Section 1101(a)(15)(E) of the INA. In addition, because Sumitomo's parent corporation apparently is a company of Japan, the parent might well have discretion protected by the Treaty to select Japanese nationals for certain top-level managerial positions in Sumitomo through the exercise of the parent's right under Article VIII(1) to engage "executive personnel" of its choice in

the United States to the extent necessary to effectuate its right under Article VII(1) to "control and manage" Sumitomo. Because the court of appeals held that Sumitomo itself is a company of Japan for purposes of Article VIII(1), that court did not consider what rights, if any, Sumitomo's parent corporation might have under that Article with regard to positions in Sumitomo.[12] These and other matters may be considered by the district court on remand.[13]

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[12] The record is not yet sufficiently developed to permit an analysis of this issue, in part because it is not clear what role Sumitomo's parent actually played in its employment decisions. Counsel for Sumitomo stated in an affidavit filed with the motion to dismiss in the district court that Sumitomo's parent corporation had assigned "many" Japanese nationals to it. J.A. 74a. However, an affidavit of counsel is not a substitute for a record on this point, and even that affidavit does not indicate how many employees were so assigned or which positions they occupy.

Although we have not yet reached a final conclusion on the question, it could be argued that the parent's right to engage Japanese nationals in connection with the operations of its U.S. subsidiary is limited to the category of "executive personnel" mentioned in Article VIII(1) of the Treaty, whose functions reasonably could be said to be essential to effectuate the parent's Article VII(1) right to "control and manage" the subsidiary; understood in this manner, the parent's rights would not necessarily extend in full force to the other categories of personnel mentioned in Article VIII(1) who, although perhaps highly qualified technicians, would not be responsible for directing Sumitomo's operations. Because respondents apparently all are present or former clerical personnel, it seems unlikely that they would qualify for or could be trained within a reasonable time to occupy the sorts of "executive" (top-level management) positions to which the parent's Article VIII(1) Treaty right would attach under this view.

[13] Another issue that would have to be addressed on remand is the interaction between Title VII and the treaty trader provisions of the INA. As explained above, under the treaty trader regulations, a person may be admitted only to occupy a top-level management position with a trading firm or to occupy another position with such a firm if he is a specialist who is truly essential to the firm's operations in the United States. We have considerable doubt that these standards, properly applied, would cover the full range of respondent's managerial and sales positions at issue in this suit,

III. ON THE PRESENT RECORD, THE COURT SHOULD NOT IN ANY EVENT REACH THE ISSUE OF THE PRECISE RELATIONSHIP BETWEEN ARTICLE VIII(1) AND TITLE VII

If the Court disagrees with our submission above and concludes that a Japanese-owned company incorporated in the United States is a company of Japan that may invoke the special employment privilege in Article VIII(1), a question then arises concerning the relationship between that employment privilege and Title VII. The district court did not consider this issue or certify it for interlocutory appeal, but the court of appeals nevertheless proceeded to decide it. For a number of reasons, we suggest that this Court refrain from doing likewise

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and it is not clear that respondent intends to assert that all of these positions are or even could be occupied by persons holding treaty trader visas. Counsel stated in his affidavit only that "many" of Sumitomo's employees have treaty trader visas. J.A. 74a.

If the treaty trader standards are correctly applied, they would probably be entirely consistent with the requirements of Title VII in the vast majority of cases. It might well be, for example, that a company could demonstrate a business necessity under Title VII standards for requiring that top-level management in a Japanese-owned trading firm be familiar with Japanese custom, language, culture, and business practices. In lower level positions, the treaty trader requirement that the alien have special skills that are not available in the United States and are essential to the effective performance of the company's business similarly would tend to justify the selection of Japanese nationals under Title VII standards.

Of course, issuance of a treaty trader visa to an alien, based on the determination by a consular officer stationed in Japan regarding the need for a Japanese national to occupy a particular position in the United States, does not immunize a Japanese-owned employer from a Title VII claim pertaining to that position. The consular officer cannot (and does not purport to) make the type of thorough inquiry into the company's employment practices that a court would make in a Title VII suit. However, the court in a Title VII suit would not have jurisdiction to review the propriety of issuing the visa or to direct the deportation of an alien. Those are matters within the exclusive jurisdiction of the State Department and the Immigration and Naturalization Service (8 U.S.C. 1103(a), 1104(a) and 1252), although an order of deportation is subject to judicial review pursuant to 8 U.S.C. 1105a.

and instead remand for further proceedings on this issue if it concludes that Sumitomo is a company of Japan for purposes of Article VIII(1).

A. The court of appeals understood Sumitomo to argue that Article VIII(1) carves out an *exemption* from Title VII for foreign-owned employers with respect to their selection of personnel in the categories mentioned in that Article. Pet. App. 3a, 13a. The court of appeals rejected this contention, concluding that Article VIII(1) "does not give [Japanese firms] license to violate American laws prohibiting discrimination in employment" (Pet. App. 13a) and noting that Sumitomo's "broad interpretation" might also immunize a Japanese firm from laws prohibiting the employment of children or granting rights to unions and employees (*id.* at 14a).

In this Court, Sumitomo now concedes that it is subject to Title VII in filling its executive positions. Br. 14; but cf. *id.* at 29-30. We agree with this concession. The definition of the terms "employer" and "employee" in 42 U.S.C. 2000e(b) and (f) contain no exceptions for an employer in the United States that is foreign-owned or for certain employees of such an employer, whether citizens or aliens. Cf. 42 U.S.C. 2000e-1; *Espinoza* v. *Farah Manufacturing Co.*, *supra*, 414 U.S. at 95. Moreover, if Article VIII(1) of the Treaty limited the application of Title VII in a case such as this, it would do so only to the extent of permitting a company of Japan to take Japanese citizenship or nationality into account in filling the enumerated positions, not to immunize selections based on sex, religion, race or even national origin, as such.[14]

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[14] This is clear from the background of Article VIII(1). Article VIII(1) was drafted against the background of "percentile" restrictions that required American companies operating abroad to hire a certain percentage of their work force from the host country's labor force. Restrictions of this kind inhibited investment abroad because they prevented American companies from hiring those individuals in whom they had the most confidence. By the same token, a number of States in this country had laws restricting or banning employment of aliens. The purpose of Article VIII(1) was to override these percentile restrictions so that American businesses operating abroad would be able to select U.S. nationals for

Sumitomo now concedes this as well. Br. 14. Sumitomo also eschews any interpretation of the Treaty that would exempt it from domestic labor legislation generally. Br. 27. The courts below did not have the benefits of Sumitomo's narrower focus.

B. We also cannot endorse the manner in which the court of appeals attempted to reconcile the employment privilege in Article VIII(1) and Title VII—by reliance upon the BFOQ exception in 42 U.S.C. 2000e-2(e). Sumitomo does not argue in this Court that it has selected employees on the basis of Japanese *national origin*; it argues that it has selected them on the basis of Japanese *citizenship*. Br. 14-18. If the district court so finds on remand, the BFOQ exception in 42 U.S.C. 2000e-2(e), which is intended for situations in which the employer explicitly selects specifically on the basis of national origin (*Dothard* v. *Rawlinson*, 433 U.S. 321, 332-333 (1977)), would appear to be inapplicable. The issue then would be whether Sumitomo's selection of Japanese nationals—what it now describes as a citizenship requirement—has the *effect* of discriminating impermissibly on the basis of national origin.[15] The appro-

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essential positions. See Note, *Commercial Treaties and the American Civil Rights Laws*, 31 Stan. L. Rev. 947, 952-953 & n.28 (1979). Thus, as explained by Herman Walker, Article VIII(1) confers a right to hire executive and technical personnel "regardless of their nationality, without legal interference from percentile restrictions and the like." Walker, *Treaties for Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, 234 (1956); see also J.A. 182a. The Executive Report submitting the Japanese Treaty to the Senate similarly stated, with respect to Article VIII(1), that "laws regarding the nationality of employees are not to prevent such nationals and companies from carrying on their activities in connection with the planning and operation of the specific enterprises with which they are connected." S. Exec. Rep. No. 5, 82 Cong., 1st Sess. 3-4 (1953). See also *Commercial Treaties: Hearings Before the Subcomm. of the House Comm. on Foreign Relations*, 83d Cong., 1st Sess. 9 (1953) (referring to a right to hire executive and technical personnel "regardless of nationality").

[15] The complaint can, of course, be read to allege intentional discrimination specifically on the basis of national origin. If that

priate defense to a facially permissible employment practice that has a discriminatory impact is that of business necessity, not BFOQ. *Dothard* v. *Rawlinson*, *supra*, 433 U.S. at 329; *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425-436 (1975); *Griggs* v. *Duke Power Co.*, *supra*. The question on remand therefore would be whether a citizenship preference that has the effect of selecting persons on the basis of their national origin can be defended on the ground that the citizenship preference has "a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971). Analysis of that question should include consideration of whether Article VIII(1) itself constitutes a legislative-type validation (as a "business necessity") of a citizenship preference (at least for the top-level "executive" positions mentioned in that Article) that excuses a company of Japan from showing the job relatedness of a citizenship preference on a case-by-case basis.[16]

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were shown, the BFOQ exception might then be invoked by Sumitomo. However, even then we would have serious reservations about the court of appeals' formulation of the BFOQ exception in this setting. Most of the factors cited by that court in its BFOQ analysis are not inextricably intertwined with a person's national origin as such, but instead are aspects of an expertise that could readily be acquired by persons *not* of Japanese national origin —— *e.g.*, knowledge of Japanese products, markets, and business practices, and familiarity with the parent enterprise. Pet. App. 15a. The unsuitability of BFOQ analysis here is further illustrated by the fact that it might permit Sumitomo to prefer U.S. citizens of Japanese national origin over other U.S. citizens, even if they have no specific knowledge of the factors just listed. We also are troubled by the court of appeals' suggestion that Japanese national origin might be a BFOQ because employees of Japanese national origin might be more acceptable to persons with whom the company does business. Pet. App. 15a. This would not ordinarily be a legitimate reason to select employees on the very bases that are prohibited by Title VII. *Fernandez* v. *Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981); cf. 29 C.F.R. 1604.2(a)(2).

[16] As we explain (see note 18, *infra*), it is not clear that any of Sumitomo's employees would fall in any of the other categories of personnel enumerated in Article VIII(1), and, indeed, the only one even mentioned by Sumitomo is that of "specialists." These other categories of personnel might be distinguish-

C. However, we believe the Court should not reach the question of the interaction of Article VIII(1) employment and Title VII because it is presented largely in the abstract in the current posture of this case. Because the decisions below were rendered in connection with Sumitomo's motion to dismiss for failure to state a claim, the record has not yet been developed and no findings have been made with respect to a broad range of matters that should inform a reasoned decision of this issue.

The matters that remain unresolved at this point include: (1) the responsibilities of and any special qualifications required for the various executive, management, and sales positions that respondents allege have been filled by Sumitomo on a discriminatory basis; (2) the manner in which persons have been selected for these positions; (3) how many of these persons are Japanese nationals; (4) the circumstances of the admission under the immigration laws of those who are Japanese nationals; (5) how many of these previously were employed by Sumitomo's parent company in Japan; (6) the

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able from "executive personnel" for present purposes in any event. Article VII(1) of the Treaty gives nationals and companies of Japan the right to "control and manage" their enterprises in the United States, and it could be argued that the discretion to select top-level "executive personnel" in whom the nationals and companies have confidence is a necessary component of that right. For other categories of personnel enumerated in Article VIII(1), however, it could be argued that the principal concern underlying that Article is to ensure free access to *qualified* persons. The treaty trader regulations ordinarily would require a showing that such an alien has special qualifications not available in the American labor market in any event. Moreover, the second sentence of Article VIII(1) makes clear that in the ordinary case, professionals entering on treaty trader visas are not exempt from domestic laws regarding licensing and other requirements. This might suggest that, even if a company of Japan had largely unfettered discretion to select Japanese nationals to fill "executive" positions, it would not be inconsistent with the purposes of Article VIII(1) to subject employment practices affecting other positions enumerated in Article VIII(1) to scrutiny under the "business necessity" standard of domestic civil rights laws.

degree to which the selection of these or other Japanese nationals working for Sumitomo has been made, or the personnel paid, by Sumitomo's parent corporation in Japan; (7) the extent to which, for Title VII purposes, the pool of potential applicants for some or all of the various positions in question would include a significant number of Japanese nationals in any event because of the particular qualifications for the position; (8) the responsibilities and qualifications of the white males and any other non-Japanese nationals, if any, who have been hired for the positions in issue (see J.A. 61a, 67a); (9) which of the positions could be said to be truly "executive" in nature, such that they would fall within the coverage of the particular Article VIII(1) privilege that Sumitomo principally asserts (see Br. i, 20, 25, 30) and the court of appeals discussed (Pet. App. 13a-15a) to select "*executive* personnel * * * of [its] choice" (emphasis added);[17] and (10) which, if any, of the positions

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[17] At some places in its brief, Sumitomo uses the term "managerial" interchangeably with "executive" or lumps "supervisory" positions with "executive" ones. See Br. 9, 23, 26, 27, 29, 41. However, the term "executive" as used in Article VIII(1) cannot be read to embrace all personnel who might be said to have some managerial or supervisory functions, as Sumitomo implies. That term connotes only top-level management officials who are responsible for making policy and directing the firm's affairs and whose services therefore can be thought to be necessary to effectuate the Article VII(1) right of a Japanese-owned corporation to "*control* and manage" its operations (emphasis added).

This relatively limited scope of the category of "executive personnel" mentioned in Article VIII(1) of the Treaty is consistent with the administration of the treaty trader section of the INA. The treaty trader regulations, which (unlike Article VIII(1)) refer to both executive and supervisory positions, nevertheless make clear that only top-level management positions are covered. See pages 3-6, *supra*. Because any Japanese nationals who would occupy the "executive" positions mentioned in Article VIII(1) presumably must be admitted to the United States under the treaty trader (or investor) provisions of the INA, the Article VIII(1) category of "executive personnel" must, be limited to top level management.

Even Sumitomo's own answers to interrogatories in district court do not characterize all positions at issue here as "executive" in

referred to in respondents' complaint would fall within any of the other categories of personnel enumerated in Article VIII(1), to the extent Sumitomo so contends.[18]

On the present record, then, it is not clear how many and in what positions Japanese nationals are employed by Sumitomo or to what extent and in what manner Sumitomo's true business requirements and the policies of the Treaty, Title VII, and the immigration laws actually are implicated by its employment practices. Cf. *Minnick* v. *California Department of Corrections*, No. 79-1213 (June 1, 1981), slip op. 18-22; *id.* at 1 (Brennan, J., concurring in the judgment). We therefore suggest that if the Court concludes that Sumitomo is a company of Japan for purposes of the Treaty, the Court should not decide on the present record the difficult and sensitive issue of first impression regarding the interaction of Article VIII(1) of the Treaty and Title VII.[19]

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nature. Only the positions of General Manager, Assistant General Manager, and (in some cases) Department Manager are placed in that category. J.A. 40a. Similarly, Sumitomo's EEO-1 forms for 1975 and 1976 state that 30 employees in the New York offices were "Officials and managers." The remainder of the positions at issue in those offices were classified as "Professionals" or "Sales workers." J.A. 61a, 67a.

[18] Although the question presented by Sumitomo in its brief (at i) mentions only the category of "executive" personnel, Sumitomo refers at several places in the body of its brief (at 10, 14, 20) to the category of "other specialists" mentioned in Article VIII(1). It is not clear, however, which (if any) of its employees Sumitomo suggests might fall in this category. In context, moreover, it seems clear that the term "specialists" in Article VIII(1) refers to persons with a particular professional or equivalent training such that their unique expertise is essential to the effective operation of the company. Mere supervisory, lower-level management, and sales personnel, for example, would not appear to fall in this category, as Sumitomo perhaps intends to argue in this case.

[19] There is, for example, little basis under the Treaty for distinguishing a U.S.-incorporated subsidiary established at the outset by and integrated with a parent trading company in Japan, such as Sumitomo, from an on-going, wholly U.S.-owned corporation serving the domestic U.S. market that is purchased by a Japanese company.

That issue, with its potentially broad implications for the Nation's foreign relations and international trade and investment under this and other similar treaties (see App. C, *infra*) should, in our view, be resolved only in a concrete factual setting.

CONCLUSION

The judgment of the court of appeals should be reversed on the ground that Sumitomo is not a company of Japan for purposes of the Treaty, including Article VIII(1), and the case should be remanded for further proceedings. If the Court concludes that Sumitomo is a company of Japan, the judgment of the court of appeals should be vacated insofar as it holds that Article VIII(1) of the Treaty and Title VII of the Civil Rights Act are to be reconciled through the BFOQ exception in 42 U.S.C. 2000e-2(e), and this aspect of the case should be remanded for further proceedings to develop a factual record.

Respectfully submitted.

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MARCH 1982

APPENDIX A

STATE DEPARTMENT INSTRUCTIONS OF JULY 10, 1981 TO DIPLOMATIC AND CONSULAR POSTS REGARDING TREATY TRADER VISAS

SUBJECT: E VISAS

REF: STATE 089624

1. THE DEPT. RECENTLY SENT TO ALL JAPANESE POSTS FURTHER GUIDELINES FOR ADJUDICATING E-1 VISA APPLICATIONS, IN ORDER TO FILL IN SOME OF THE INSTRUCTIONAL GAPS IN THE FAM NOTES AND TO FOSTER UNIFORMITY OF REGULATORY INTERPRETATION. IT NOW APPEARS THAT IT WILL BE SOME TIME BEFORE FAM REVISIONS BASED ON THAT CABLE ARE COMPLETED, SO THE TEXT IS PROVIDED BELOW FOR ALL POSTS' INFO AND GUIDANCE IN THE INTERIM.

2. THE FOLLOWING IS THE TEXT OF STATE 089624: QUOTE

1. AS PROMISED IN REFTEL B, THE FOLLOWING IS A WRAP-UP OF THE DEPARTMENT'S PRECEDENTIAL GUIDELINES OVER THE YEARS FOR ADJUDICATING ENTITLEMENT TO E-1 TREATY TRADER VISAS. CONTRARY TO THE SUSPICION GENERATED BY THE WIDESPREAD ATTENTION GIVEN TO THE CLAIMED "JAPANESE E VISA PROBLEM", THERE IS NOTHING NEW OF IMPORTANCE IN THESE GENERAL GUIDELINES. RATHER, THEY ARE BASED ON PRECEDENTIAL MATERIALS GOING BACK AS FAR AS THE 1950'S,

AND POSTS WILL FIND THAT MUCH OF THE LANGUAGE HEREIN REPETITIVE OF ADVISORY OPINIONS RECEIVED IN THE PAST.

2. WITHIN THE SUBSTANTIVE E-1 VISA CONTEXT, THREE KEY ISSUES SEEM TO SURFACE WITH SOME FREQUENCY: A) THE NATURE OF AN "EXECUTIVE/SUPERVISORY" POSITION; B) THE "SPECIFIC QUALIFICATIONS" THAT MAKE A GIVEN APPLICANT'S SKILLS "ESSENTIAL" TO A FOREIGN FIRM'S US OPERATIONS; AND C) WHAT ACTIVITIES CONSTITUTE "SUBSTANTIAL TRADE" WITHIN THE MEANING OF SECTION 101 (A) (15) (E) OF THE INA. A SEPARATE, LESSER, ISSUE IS THE SUITABILITY IN VARYING CIRCUMSTANCES OF SUBSTITUTING THE "L" INTRA-COMPANY TRANSFEREE VISA CLASSIFICATION FOR THE E-1 CLASSIFICATION.

3. EXECUTIVE/SUPERVISORY POSITION. THERE ARE NO "BRIGHT LINE" TESTS FOR EASILY DETERMINING WHETHER A GIVEN APPLICANT IS DESTINED TO AN EXECUTIVE OR SUPERVISORY POSITION AND THEREFORE ENTITLED TO AN E-1 VISA. MUCH DEPENDS ON THE CONSULAR OFFICER'S JUDGEMENT OF THE PECULIAR FACTUAL CIRCUMSTANCES OF EACH INDIVIDUAL CASE. INDEED THE DEPARTMENT HAS CONSISTENTLY ARGUED THAT DETAILED

GUIDELINES ARE NOT DESIRABLE, SINCE THIS WOULD SUBSTANTIALLY HEIGHTEN THE DANGER OF CASTING THE ADMINISTRATION OF TREATY TRADER VISAS INTO AN OVERLY RIGID MOLD AND THEREBY INHIBIT THE INHERENT FLEXIBILITY OF THE E VISA NEEDED TO COVER THE MYRIAD TRADE SITUATIONS IN THE COMPLEX MODERN-DAY INTERNATIONAL ECONOMIC ARENA.

4. IN ASSESSING AN EXECUTIVE/SUPERVISORY QUESTION RAISED BY AN INDIVIDUAL CASE, FACTORS WHICH MAY BE WEIGHED INCLUDE, AMONG OTHERS, THE TITLE OF THE POSITION TO WHICH AN APPLICANT IS DESTINED, THE LOCATION OF THE JOB IN THE FIRM'S ORGANIZATIONAL STRUCTURE, THE DUTIES INVOLVED, THE DEGREE TO WHICH THE APPLICANT WILL HAVE ULTIMATE CONTROL AND RESPONSIBILITY FOR THE FIRM'S OVERALL OPERATIONS OR A MAJOR COMPONENT THEREOF, THE NUMBER AND SKILL LEVELS OF THE EMPLOYEES WITHIN HIS RESPONSIBILITY, AND WHETHER HE PRESENTLY POSSESSES EXECUTIVE OR SUPERVISORY EXPERIENCE WHICH WOULD REASONABLY QUALIFY HIM FOR THE PROPOSED ASSIGNMENT. A FEDERAL DISTRICT COURT RULING IN "SANSEI V. ESPERDY, 298 F. SUPP. 945 (1969)", INDICATES THAT LEVEL OF PAY IS ANOTHER FACTOR THAT MAY PROPERLY BE CONSIDERED. THE CONSULAR OFFICER MAY REQUEST SUCH DOCUMENTATION AS HE FEELS NECESSARY TO SATISFY HIMSELF THAT THE POSITION IS INDEED EXECUTIVE OR SUPERVISORY IN CHARACTER, AND SHOULD SEEK TO ELICIT FURTHER INFO IF NECESSARY DURING THE VISA INTERVIEW.

5. ONCE ALL THE NECESSARY FACTS AND EVIDENCE ARE BEFORE THE CONSULAR OFFI-

CER IN A SPECIFIC CASE, THE TEST TO BE APPLIED IS ESSENTIALLY ONE OF WHETHER THE EXECUTIVE/SUPERVISORY COMPONENT OF THE DESCRIBED POSITION IS AN "INCIDENTAL/COLLATERAL" FUNCTION OF THE JOB OR A "PRINCIPAL/PRIMARY" FUNCTION ESSENTIALLY INHERENT IN THE JOB'S VERY NATURE. IF THE POSITION PRINCIPALLY REQUIRES MANAGEMENT SKILLS, OR ENTAILS SUPERVISION OVER AND KEY RESPONSIBILITY FOR A LARGE PORTION OF A FIRM'S OPERATION, AND ONLY INCIDENTALLY INVOLVES SUBSTANTIVE, DAY-TO-DAY STAFF WORK RELATED TO THE FIRM'S TYPE OF BUSINESS, E-1 WOULD BE APPROPRIATE IN MOST CIRCUMSTANCES. CONVERSELY, IF THE POSITION CHIEFLY INVOLVES ROUTINE WORK THAT IS THE SUBJECT MATTER OF THE BUSINESS AND ONLY SECONDARILY ENTAILS SUPERVISION OF SEVERAL LOW-LEVEL EMPLOYEES, THEN THE POSITION IN ALL PROBABILITY COULD NOT BE TERMED "EXECUTIVE OR SUPERVISORY" IN CHARACTER.

6. POSTS SHOULD ALSO BE AWARE THAT THE WEIGHT TO BE ACCORDED A GIVEN FACTOR MAY VARY DEPENDING ON THE CIRCUMSTANCES OF THE PARTICULAR CASE. AS A

SIMPLE EXAMPLE, A POSITION DESCRIPTION GIVING THE NOMINAL TITLE OF "VICE PRESIDENT" TO THE SECOND MAN IN A SMALL TWO-MAN BANKING OFFICE WOULD BE OF LITTLE UTILITY IN A CLAIM THAT THE POSITION WAS A SUPERVISORY ONE. THE SAME TITLE, WHILE NOT DETERMINATIVE IN ITSELF, WOULD CARRY GREATER WEIGHT IN THE CASE OF AN APPLICANT COMING TO A MAJOR BANKING OPERATION HAVING NUMEROUS EMPLOYEES. INDEED, IN THE LATTER CASE, AN APPLICANT COMING TO HEAD ONE OF THAT OPERATION'S BUREAUS OR DEPARTMENTS (E.G. ACCOUNTING, LOANS, ETC) COULD PROBABLY BE DEEMED DESTINED TO AN EXECUTIVE OR SUPERVISORY POSITION AND THEREFORE ENTITLED TO E-1 ISSUANCE.

7. ALSO ILLUSTRATIVE IS THE BIA'S DECISION IN "MATTER OF UDAWAGA", 14 I AND N DEC. 578 (1974) THAT A RESTAURANT CHEF WHO WOULD TRAIN AND SUPERVISE OTHER COOKS IN A SMALL RESTAURANT WAS NOT ENTITLED TO TREATY INVESTOR STATUS. ITS RATIONALE WAS THAT CONGRESS DID NOT INTEND FOR "MINOR MANAGERIAL POSITIONS" TO BE FILLED BY ALIEN WORKERS WHEN THE POSITION COULD BE HELD BY AN AMERICAN EMPLOYEE "WITHOUT PLACING IN JEOPARDY THE U.S. INVESTMENT MADE BY A FOREIGN FIRM". MANAGERIAL STANDARDS FOR BOTH E-1 AND E-2 VISAS ARE FUNDAMENTALLY THE SAME.

8. "ESSENTIAL" SKILLS. HERE AGAIN, THERE ARE NO CLEAR "TESTS" FOR EASILY JUDGING

WHETHER AN ALIEN POSSESSES "SPECIFIC QUALIFICATIONS" THAT ARE "ESSENTIAL" TO A TREATY TRADER FIRM'S US OPERATIONS. THE NATURE OF THE DETERMINATION IS SUCH THAT EACH CASE MUST BE EXAMINED INDIVIDUALLY ON ITS OWN FACTS AND MERITS. GENERALLY, TWO THOUGHTS SHOULD BE BORNE IN MIND. FIRST, E-1 STATUS IS INTENDED ONLY FOR THE ENTRY OF SPECIALIST EMPLOYEES TRULY ESSENTIAL TO THE FIRM'S OPERATIONS IN THE U.S., AND NOT AS A CHANNEL FOR THE IMPORTATION OF ORDINARY SKILLED WORKERS NO MATTER HOW DESIRABLE THIS MIGHT BE FROM THE FIRM'S VIEWPOINT. SECONDLY, A COMMON THEME IN SUCH CASES IS THE QUESTION, "WHAT IS IT THAT THE FOREIGN WORKER CAN DO UNDER THE CIRCUMSTANCES THAT AN AMERICAN WORKER CANNOT DO OR CANNOT BE TRAINED TO DO?

9. THE BURDEN OF PROOF IN "ESSENTIAL SKILLS" CASES IS ON THE COMPANY AND THE APPLICANT. THE CONSULAR OFFICER IS NOT BOUND BY THE EMPLOYEE'S ASSERTIONS OR TERMINOLOGY IN DESCRIBING THE POSITION, BUT MAKES HIS OWN DETERMINATION OF THE ALIEN'S QUALIFICATIONS. SUCH FACTORS AS THE ALIEN'S DEGREE OF PROVEN EXPERTISE IN HIS AREA OF SPECIALIZATION, THE UNIQUENESS OF HIS SPECIFIC SKILLS, LENGTH OF

EXPERIENCE AND TRAINING WITH THE INTERESTED FIRM, THE PERIOD OF TRAINING REASONABLY NECESSARY TO PERFORM THE CONTEMPLATED DUTIES, THE KIND OF SALARY THE TECHNICIAN'S SPECIAL EXPERTISE CAN COMMAND, ETC., ARE GIVEN CONSIDERATION. 22 CFR 41.40 NOTE 10 PROVIDES ALSO THAT HIGHLY TRAINED TECHNICIANS MAY BE ISSUED E-1 VISAS FOR CERTAIN FUNCTIONS; THE EMPHASIS IS ON "HIGHLY" TRAINED AND THE PRESUMPTION IS THAT U.S. WORKERS WILL BE TRAINED IN DUE COURSE TO REPLACE THE FOREIGN TECHNICIANS, THUS OBVIATING THE NEED FOR CONTINUAL REPLACEMENT OF THESE TECHNICIANS WITH MORE FOREIGN TECHNICIANS AFTER A REASONABLE PERIOD OF TIME.

10. IN ASSESSING WHETHER COMPETENT U.S. WORKERS ARE AVAILABLE TO PERFORM THE SKILLS NEEDED BY THE TREATY TRADER FIRM, THE CONSULAR OFFICER SHOULD RELY IN LARGE PART ON HIS OWN KNOWLEDGE OF CONDITIONS IN THE AMERICAN LABOR MARKET. IN MOST INSTANCES, THE FACTS OF A PARTICULAR APPLICANT'S CASE WILL SUGGEST THE PROPER DECISION TO BE MADE. FOR EXAMPLE, A TV REPAIRMAN WOULD NOT GENERALLY QUALIFY, WHILE A TV TECHNICIAN COMING TO TRAIN US WORKERS IN NEW TECHNOLOGY INCORPORATED IN A TV PRODUCT NOT YET GENERALLY AVAILABLE IN THE U.S. MARKET PROBABLY WOULD QUALIFY UNDER NOTE 10. IN RARE CASES WHERE THE ESSENTIAL SKILLS

QUESTION CANNOT BE RESOLVED ON THE FACTS OF THE CASE AND ADDITIONAL INFO SOLICITED FROM THE FIRM, THE FIRM MIGHT BE ASKED TO PROVIDE STATEMENTS REGARDING THE UNAVAILABILITY OF US WORKERS FROM SUCH KNOWLEDGEABLE SOURCES AS CHAMBERS OF COMMERCE, LABOR ORGANIZATIONS, INDUSTRY TRADE SOURCES OR STATE EMPLOYMENT SERVICES. AS A FOOTNOTE, POSTS ARE REMINDED THAT KNOWLEDGE OF THE JAPANESE LANGUAGE AND CULTURE HAS BEEN SPECIFICALLY FOUND BY THE BIA NOT TO BE A SPECIFIC QUALIFICATION ESSENTIAL TO A FIRM'S U.S. OPERATIONS WITHIN THE MEANING OF THE REGULATION. SEE "MATTER OF KONISHI", 11 I. AND N. DEC. 815 (1966).

11. TRADE. QUESTIONS OF WHETHER A PARTICULAR JAPANESE FIRM QUALIFIES AS A TREATY TRADER FIRM ON THE BASIS OF "SUBSTANTIAL TRADE" WITH THE US SEEM TO OCCUR RELATIVELY INFREQUENTLY. 22 CFR 41.40 AND NOTES THERETO PROVIDE A GOOD BASIS FOR DETERMINING WHETHER THE REQUISITE TRADE RELATIONSHIP EXISTS.

12. 22 CFR 41.40 NOTE 5 PROVIDES SOME GENERAL GUIDELINES CONCERNING WHAT ACTIVI-

TIES OF A COMMERCIAL NATURE CONSTITUTE "TRADE". BEYOND THESE, THE TERM "TRADE" IS RELATIVELY VAGUE AND AMENABLE TO VARYING INTERPRETATIONS. LEGISLATIVE HISTORY AND PRECEDENT DECISIONS, INCLUDING BY FEDERAL COURTS, ARE NOT ENLIGHTENING ON THE SUBJECT. THE AVAILABLE BACKGROUND INFO SUGGESTS THAT THE CONCEPT OF "TRADE" WAS TO BE VIEWED IN A BROAD AND LIBERAL MANNER, SO AS TO PROVIDE THE FLEXIBILITY TO ENCOMPASS THE WIDE-RANGING TYPES OF TRANSACTIONS IN THE BUSINESS WORLD.

13. AS INDICATED BY 22 CFR 41.40 NOTE 5.2, THE FOCUS OF THE INQUIRY SHOULD BE ON THE EXISTENCE OF A "TRANSACTION", OR EXCHANGE OF GOODS AND MONIES IN THE FLOW OF INTERNATIONAL COMMERCE WHICH SUPPOSEDLY BENEFIT BOTH PARTIES TO THAT TRANSACTION. THE SIMPLEST EXAMPLE IS THE FLOW OF MANUFACTURED GOODS FROM A PARTICULAR JAPANESE COMPANY TO THE U.S. IN EXCHANGE FOR US MONIES. SIMILARLY, IN INSURANCE TRANSACTIONS, THE PROTECTION AFFORDED BY FOREIGN INSURANCE—THE POLICY—FLOWS TO THE BENEFIT OF THE U.S. HOLDER OF THAT INSURANCE IN EXCHANGE FOR US PAYMENT FOR THAT POLICY. JAPANESE TOURIST MONIES FLOW TO THE U.S. IN EXCHANGE FOR TRANSPORTATION TICKETS, HOTEL ACCOMMODATIONS, ETC. IN THE BANKING CONTEXT, THE COMMODITY BEING

EXCHANGED CONSISTS OF MONEY, SECURITIES, AND OTHER FORMS OF FINANCIAL "PAPER".

14. THE MOST PROBLEMATIC CONCERN IN THE JAPANESE CONTEXT SEEMS TO BE THE REQUIREMENT OF A DIRECT TRADE LINK BETWEEN THE US AND JAPAN, WHICH IMPACTS ON JAPANESE MANUFACTURERS WHO DEAL EXCLUSIVELY OR LARGELY THROUGH THE JAPANESE TRADING COMPANIES. HERE, THESE SITUATIONS CAN PERHAPS BE BEST ANALYZED BY POSTS BY FOCUSING ON THE SPECIFIC "TRANSACTION" OR EXCHANGE IN QUESTION AND THE PARTIES THERETO. THUS, IF JAPANESE MANUFACTURER "A" SELLS ITS GOODS TO JAPANESE TRADING COMPANY "B", WHO IN TURN SELLS THOSE GOODS IN THE US TO US COMPANY "C", THERE ARE TWO "TRANSACTIONS", ONE BETWEEN A AND B AND ANOTHER BETWEEN B AND C. BECAUSE THE FORMER TRANSACTION IS WHOLLY DOMESTIC TO JAPAN, COMPANY A COULD NOT QUALIFY AS A TREATY TRADER, WHILE COMPANY B IS ENTITLED TO THAT STATUS ON THE BASIS OF THE LATTER TRANSACTION.

15. POSTS SHOULD TAKE CARE, HOWEVER, TO DISTINGUISH BETWEEN THE ABOVE SCENARIO AND THE SEPARATE SITUATION WHERE THE MANUFACTURER MERELY CONSIGNS HIS GOODS IN SOME FASHION TO THE TRADING COMPANY WHICH HANDLES AND FACILITATES THE ONWARD SHIPMENT OF THE GOODS TO THE US. THE KEY IN MOST OF THESE CASES IS

WHETHER AN ACTUAL SALE OF THE GOODS HAS OCCURRED BETWEEN A AND B, THUS CUTTING OFF A'S OWNERSHIP OR TITLE TO THE GOODS. IF A HAS LOST OWNERSHIP TO THE GOODS BY SALE TO B, THEN A CANNOT BENEFIT FOR TREATY TRADER PURPOSES FROM THE INCIDENTAL FACT THAT THE GOODS ULTIMATELY REACH U.S. MARKETS; THE DIRECT TRADE LINK TO THE U.S. IS BROKEN. ON THE OTHER HAND, IF A RETAINS AN OWNERSHIP INTEREST IN THE GOODS, IT CAN BE VIEWED AS TRADING WITH THE US DIRECTLY IRRESPECTIVE OF THE FACT THAT AN INTERMEDIATE COMPANY HANDLES THEIR SHIPMENT.

16. FOR POSTS' INFO. THE INTRICATE NATURE OF MODERN INTERNATIONAL BUSINESS DEALINGS HAVE GIVEN RISE TO SEVERAL VISA-RELATED QUESTIONS FROM POSTS IN VARIOUS PARTS OF THE WORLD CONCERNING THE REFINEMENT OF THE DEFINITION OF "TRADE". THEREFORE, VO HAS UNDERTAKEN AN INFORMAL, LONG-TERM REVIEW OF THAT DEFINITION WITH A POSSIBLE VIEW TOWARD REVISING AND EXPANDING THE FAM NOTES TO ENCOMPASS SOME OF THESE QUESTIONS. ANY INPUT POSTS WISH TO MAKE CONCERNING THE WORKINGS AND PROBLEMS OF JAPANESE-U.S. TRADE, AND PARTICULARLY THE PECULIAR RELATIONSHIP BETWEEN JAPANESE MANUFACTURERS AND THE LARGE "TRADING COMPANIES" WOULD BE WELCOME.

17. "E" VS "L": POSTS SHOULD BE CAREFUL TO DISTINGUISH BETWEEN THE "E" AND "L" CLASSIFICATIONS, AND THE SITUATIONS WHERE EACH IS APPROPRIATE. THE INTRA-COMPANY TRANSFEREE CATEGORY WAS DESIGNED TO SUPPLEMENT, NOT SUPPLANT, THE TREATY TRADER VISA IN INSTANCES WHERE THE LATTER IS UNAVAILABLE, SUCH AS WHERE NO TREATY EXISTS, THE FIRM IS AMERICAN, THE FIRM LACKS THE REQUISITE "SUBSTANTIAL TRADE", OR WHERE THE APPLICANT IS A THIRD-COUNTRY NATIONAL EMPLOYEE OF A TREATY TRADER FIRM. THE "L" VISA WAS NOT INTENDED FOR USE IN CASES WHERE THE INTENDED POSITION OR THE APPLICANT HIMSELF LACKS THE REQUISITE QUALIFICATIONS FOR AN "E" VISA, THAT IS, WHERE THE POSITION IS NOT EXECUTIVE/SUPERVISORY IN NATURE OR HE DOES NOT HAVE "ESSENTIAL" SKILLS. AS WITH "E" VISAS, SECTION 101 (A) (15) (L) REQUIRES THAT THE POSITION BE MANAGERIAL OR EXECUTIVE, OR THAT THE APPLICANT HAVE SPECIALIZED KNOWLEDGE IN ORDER FOR HIM TO BE ENTITLED TO "L" STATUS.

18. POLICY GUIDANCE. THERE IS LITTLE THAT CAN OR NEED BE ADDED TO PREVIOUS

GUIDANCE PROVIDED IN REFTELS AND OTHER DEPARTMENT CABLES. REACTION OVER THE JAPANESE E VISA "ISSUE" SEEMS TO HAVE ESSENTIALLY RUN ITS COURSE IN ANY CASE, ALTHOUGH SPORADIC INQUIRIES ARE STILL MADE. IT MAY BE HELPFUL TO POSTS TO KEEP IN MIND THAT JAPANESE BUSINESS SENSITIVITY OVER E VISA QUESTIONS AND THE PERCEIVED LINKAGE TO TRADE ISSUES IS NOT A NEW PHENOMENON, BUT RATHER A RECURRING THEME OVER THE YEARS. ILLUSTRATIVE OF THIS IS OSAKA KOBE'S A-16 OF JUNE 21, 1972, WHICH MENTIONS THE POLICY IMPLICATIONS JAPANESE BUSINESSMEN FELT AT THAT TIME WERE LINKED TO E VISA PROBLEMS, AND MATERIALS IN VO'S PRECEDENT FILES WHICH SUGGEST THAT JAPANESE WORRIES OVER THE BROADER BILATERAL TRADE RELATIONSHIP WERE IN THE BACKGROUND OF OTHER E VISA CASES OVER THE YEARS.

19. DEPARTMENT ENCOURAGES POSTS TO CONTINUE EFFORTS, SUCH AS THOSE MENTIONED IN OSAKA KOBE'S CABLE 1177 OF 11/14/80, TO HOLD DISCUSSIONS WITH JAPANESE BUSINESSMEN AND COMPANIES, AND OTHERWISE KEEP THEM INFORMED OF E VISA REQUIREMENTS. SUCH INFORMATIONAL EXCHANGES CAN HELP ALLEVIATE MANY OF THE JAPANESE CONCERNS OVER E VISA MATTERS, ELIMINATE CONFUSION OVER THE CRITERIA FOR SUCH VISAS AND DOCUMENTARY EVIDENCE NEEDED TO SUPPORT APPLICATIONS, AND GENERALLY FOSTER AN ATMOSPHERE OF BETTER UNDERSTANDING AND COOPERATION BETWEEN JAPANESE BUSINESSMEN AND CONSULAR OFFICIALS. UNQUOTE HAIG

APPENDIX B

TEXT OF CABLE FROM THE UNITED STATES EMBASSY IN TOKYO TO THE SECRETARY OF STATE, RECEIVED FEBRUARY 26, 1982

FM AMEMBASSY TOKYO

TO SECSTATE WASHDC IMMEDIATE 8496

UNCLAS TOKYO 03300

E.O.12065: N/A
TAGS: EEWT, PGOV, JA
SUBJECT: AVIGLIANO V. SUMITOMO IN SUPREME COURT

REFS: (A) STATE 026490; (B) STATE 049474; (C) TOKYO 02843

1. MFA SECOND NORTH AMERICA DIVISION DEPUTY CHIEF YAMADA CALLED IN EMBOFF ON AFTERNOON FEBRUARY 26 TO DELIVER FOLLOWING OFFICIAL MFA POSITION REGARDING THE AVIGLIANO-SUMITOMO CASE:

"A. THE MINISTRY OF FOREIGN AFFAIRS, AS THE OFFICE OF GOJ RESPONSIBLE FOR INTERPRETATION OF THE FCN TREATY, REITERATES ITS VIEW CONCERNING THE APPLICATION OF ARTICLE 8 PARAGRAPH 1 OF THE TREATY: FOR THE PURPOSE OF THE TREATY, COMPANIES CONSTITUTED UNDER THE APPLICABLE LAWS AND REGULATIONS WITHIN THE TERRITORIES OF EITHER PARTY SHALL BE DEEMED COMPANIES THEREOF AND, THEREFORE, A SUBSIDIARY OF A JAPANESE COMPANY WHICH IS INCORPORATED UNDER THE LAWS OF NEW YORK IS NOT COVERED BY ARTICLE 8 PARAGRAPH 1 WHEN IT OPERATES IN THE UNITED STATES.

"B. THE MINISTRY OF FOREIGN AFFAIRS NOTES THAT THE ENCOURAGEMENT OF MUTUALLY BENEFICIAL INVESTMENTS BETWEEN THE TWO COUNTRIES IS AN IMPORTANT OBJECT AND PURPOSE OF THE FCN TREATY AND, IN THIS REGARD, HOPES THAT THE SUMITOMO CASE WILL BE SETTLED IN SUCH A MANNER AS NOT TO DISCOURAGE SOUND ACTIVITIES OF SUBSIDIARIES OF JAPANESE COMPANIES IN THE UNITED STATES."

2. YAMADA NOTED THAT THE FOREGOING WAS "NOT AN AGREED PAPER," OR JOINT STATEMENT BY MFA AND MITI; HOWEVER, MFA'S POSITION HAD BEEN MADE KNOWN IN SUBSTANCE TO MITI, WHICH HAD POSED NO OBJECTION.

CLARK

APPENDIX C

Post World War II Treaties of Friendship, Commerce, and Navigation Between the United States and other Nations that Contain an Employment Privilege Similar to (but Sometimes with Arguably Substantial Differences from) that in Article VIII(1) of the Japanese Treaty

BELGIUM.

Treaty of Friendship, Establishment and Navigation (Article 8(1)(2)), Feb. 12, 1961, (Treaty of 1875 in force prior to this date) 14 U.S.T. 1284, T.I.A.S. 5432.

[1] DENMARK.

Treaty of Friendship, Commerce, and Navigation (Article VII(4)), Oct. 1, 1951, (Convention of 1826 was in force prior to this date) 12 U.S.T. 908, T.I.A.S. 4797.

ETHIOPIA.

Treaty of Amity and Economic Relations. (Article VIII(5)), Sept. 7, 1951, 4 U.S.T. 2134, T.I.A.S. 2864.

FRANCE.

Convention of Establishment, Protocol, and Declaration (Article VI(1)(2), Protocol (9)), Nov. 25, 1959, 11 U.S.T. 2398, T.I.A.S. 4625.

[2] GERMANY.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1)), Oct. 29, 1954, 7 U.S.T. 1839, T.I.A.S. 3593.

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[1] DENMARK. The Convention of 1826 does not apply to the Faroe Islands or Greenland.

[2] GERMANY. The Treaty which entered into force in 1956 now applies to Berlin, as defined in Article XXVI thereof.

GREECE.

Treaty of Friendship, Commerce and Navigation (Article XII(4)), Aug. 3, 1951, 5 U.S.T. 1829, T.I.A.S. 3057.

IRAN.

Treaty of Amity, Economic Relations and Consular Rights (Article IV(4)), Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. 3853.

IRELAND.

Treaty of Friendship, Commerce and Navigation (Article VI(1)), Jan. 21, 1950, 1 U.S.T. 785, T.I.A.S. 2155.

ISRAEL.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1)), Aug. 23, 1951, 5 U.S.T. 550, T.I.A.S. 2948.

ITALY.

Treaty of Friendship, Commerce, and Navigation (Article I(2), III(3), Supp., Art. II), Feb. 2, 1948, 63 Stat. 2255, T.I.A.S. 1965.

[3] JAPAN.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1)), Apr. 2, 1953, 4 U.S.T. 2063, T.I.A.S. 2863.

KOREA.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1)), Nov. 28, 1956, 8 U.S.T. 2217, T.I.A.S. 3947.

LUXEMBOURG.

Treaty of Friendship, Establishment and Navigation (Article VIII(1)(2), Prot. (7)), Feb. 23, 1962, 14 U.S.T. 251, T.I.A.S. 5306.

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[3] JAPAN. The Treaty which entered into force in 1953 does not apply to trade with the Ryukyu Islands (south of 29 degrees north latitude), or to certain lesser island groups specified in Protocol paragraph 13 thereof.

MUSCAT AND OMAN (THE SULTANATE OF).

Treaty of Amity, Economic Relations and Consular Rights (Article V(3)), Dec. 20, 1958, 11 U.S.T. 1835, T.I.A.S. 4530.

NETHERLANDS.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1), Prot. (11)), Mar. 27, 1956, 8 U.S.T. 2043, T.I.A.S. 3942.

NICARAGUA.

Treaty of Friendship, Commerce, and Navigation (Article VIII(1)), Jan. 21, 1956, 9 U.S.T. 449, T.I.A.S. 4024.

PAKISTAN.

Treaty of Friendship, Commerce, and Protocol (Article VIII(1)), Nov. 12, 1959, 12 U.S.T. 110, T.I.A.S. 4683.

TAIWAN.

Treaty of Friendship, Commerce and Navigation, with Protocol (Article II(2)), Nov. 4, 1946, 63 Stat. 1299.

THAILAND.

Treaty of Amity and Economic Relations (Article IV(6)), May 29, 1966, 19 U.S.T. 5843, T.I.A.S. 6540.

TOGO.

Treaty of Amity and Economic Relations (Article V(3)(4)), Feb. 5, 1967, 18 U.S.T. 1, T.I.A.S. 6193.

VIETNAM.

Treaty of Amity and Economic Relations (Article V(2)(3)), Nov. 30, 1961, 12 U.S.T. 1703, T.I.A.S. 4890.

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